TOIN THE HIGH COURT OF GUJARAT AT AHMEDABAD

SPECIAL CIVIL APPLICATION No. 10523 of 2006
with
SPECIAL CIVIL APPLICATION No. 10516 of 2006
with
SPECIAL CIVIL APPLICATION No. 10524 of 2006
with
SPECIAL CIVIL APPLICATION No. 10527 of 2006
with
SPECIAL CIVIL APPLICATION No. 10528 of 2006
with
SPECIAL CIVIL APPLICATION No. 10529 of 2006
with
SPECIAL CIVIL APPLICATION No. 10756 of 2006
with
SPECIAL CIVIL APPLICATION No. 9971 of 2006
with
CIVIL APPLICATION No.7139 of 2006
in
SPECIAL CIVIL APPLICATION No. 9971 of 2006

For Approval and Signature:

MR.JUSTICE RAVI R.TRIPATHI

==========

1 Whether Reporters of Local Papers may be allowed to see the judgment ?

2 To be referred to the Reporter or not ?

3 Whether their Lordships wish to see the fair copy of the judgment ?

4 Whether this case involves a substantial question of law as to the interpretation of the constitution of India, 1950 or any order made thereunder ?

5 Whether it is to be circulated to the civil judge ?

==========

RAJAN VASUDEVBHAI DAPKI & 2 - Petitioner(s)

Versus

SECURITIES AND EXCHANGE BOARD OF INDIA - Respondent(s)

==========

Appearance :

SCA No.10523/06 : Ms.Dharmishtha Raval with Mr.K.B. Trivedi, Senior Advocate for petitioners 1-3
M/s Singhi & Co. for respondent no.1
Mr.Mihir Joshi, Senior Advocate with
Mr.Bijal Chhatrapati and Mr.Jay Amin for
M/s Singhi &Co. for respondent-SEBI.

SCA No.10516/06 : Mr.Sanjay A.Mehta for petitioner.
Mr.Bijal Chhatrapati and Mr.Jay Amin for
M/s Singhi &Co. for respondent-SEBI.

SCA No.10524/06 :Ms.Dharmishtha N. Raval with Mr.K.S. Nanavati,
Senior advocate for petitioner.
Mr.Bijal Chhatrapati and Mr.Jay Amin for
M/s Singhi &Co. for respondent-SEBI.

SCA No.10527/06 :Ms.Dharmishtha N. Raval with Mr.K.S. Nanavati,
Senior advocate for petitioner.
Mr.Bijal Chhatrapati and Mr.Jay Amin for
M/s Singhi &Co. for respondent-SEBI.

SCA No.10528/06 :Ms.Dharmishtha N. Raval for petitioners no.1 & 2.
Mr.Bijal Chhatrapati and Mr.Jay Amin for
M/s Singhi &Co. for respondent-SEBI.

SCA No.10529/06 :Ms.Dharmishtha N. Raval with Mr.M.D. Pandya for petitioner.
Mr.Bijal Chhatrapati and Mr.Jay Amin for
M/s Singhi &Co. for respondent-SEBI.

SCA No.10756/06 : Mr.G.N. Shah with Ms.Minoo A. Shah for petitioner.
Mr.Bijal Chhatrapati and Mr.Jay Amin for

M/s Singhi &Co. for respondent-SEBI.

SCA No.9971/06 :Ms.Dharmishtha N. Raval for petitioner
Mr.Bijal Chhatrapati and Mr.Jay Amin for M/s Singhi &Co. for respondent-SEBI.

CA No.7139/06 : M/s Singhi & Co. for applicant.
in SCA NO.9971/06 Mr.Bijal Chhatrapati and Mr.Jay Amin for M/s Singhi &Co. for respondent-SEBI.

==========

CORAM : HONOURABLE MR.JUSTICE RAVI R.TRIPATHI

Date : 17/07/2006

COMMON ORAL JUDGMENT

The petitioners being aggrieved of order dated 27th April 2006 (Annexure 'A') are before this Court.

2. In Special Civil Application No.10523 of 2006, petitioner no.2 is a member of the Ahmedabad Stock Exchange and a Sub-broker of ASE Capital Markets Limited. Petitioner no.2 is carrying on his activities as a proprietary firm. Petitioner no.1 is the son of petitioner no.2. Petitioner no.3 is the daughter in law of petitioner no.2.

It is claimed in the petition that petitioners no.1 and 3 are investing in the securities market and they are neither broker, sub-broker nor intermediary as defined under section 12 of the Securities and Exchange Board of India Act, 1992 (hereinafter referred to as “SEBI Act).

3. The Securities and Exchange Board of India (hereinafter referred to as “SEBI”) passed an order on 27th April 2006. The order runs into 252 pages. Para 1 of the order sets out the background in which the order is required to be passed. Para 2 sets out the modus operandi and in para 2 itself, in para 2.2, it is stated that,

> “It was found that almost all the dematerialised accounts that were in the names of factitious/ benami entities were held through the depository participant Karvy Stock Broking Ltd. (Karvy-DP). Inspection of Karvy-DP by NSDL and CDSL has revealed that the DP has obtained letters from the concerned banks towards proof of identity (POI) and proof of address (POA) for the purpose of opening dematerialised accounts. In terms of SEBI circular ref: MRD/ DoP/ Dep/ Cir-29/ 2004 dated August 24, 2004, an identity card/ document issued by Scheduled Commercial Banks containing the applicant's photo/ address may be accepted as POI and POA. The circular further clarified that “the aforesaid documents are the minimum requirement for opening a BO Account. The Depository Participants (DPs) must verify the copy of the document with the original before accepting the same as valid. While opening a BO Account, the DPs are required to exercise due diligence while establishing the identity of the person to ensure the safety and integrity of the depository system.” Thus, it appears that first

> the bank accounts were opened in the names of fictitious/ benami entities and this facilitated the fictitious/ benami bank holders to open dematerialised accounts."

Para 2.4 of the order sets out the further modus operandi. It reads as under:

> "The findings of RBI also confirm the preliminary findings of SEBI that these thousands of name-lenders are fictitious. Even the key persons (master account-holders) who had executed the game plan were merely intermediaries acting on behalf of financiers. These key persons and their financiers are not investors but mere rank opportunists who seek to make a killing by disposing the IPO shares cornered by them on the date of listing. The banks have also played their part by opening bank accounts and providing loan to these fictitious entities with the objective of earning interest and other charges."

4. The order in para 4 defines various terms which are used in the order. Some of them are reproduced herein for ready perusal.

> (a) Financier -- is a person who either on his own or along with others provided the finance for IPO subscription and are the ultimate beneficiaries in the scheme of cornering retail

allotment and forking out a big gain on sale immediately after listing.

"(b) Master Account-holders/ Key Operators are the 24 entities identified in the sweep of this order who allowed their demat accounts for temporarily parking credits received from a multitude of afferent accounts before transfer to financiers."

"(c) 'Afferent Accounts' (benami/ fictitious accounts) would refer to countless demat accounts in benami and fictitious names, the credits from where found its confluence in the master accounts."

The petitioners in SCA No.10523 of 2006 appear in a list of Master Account Holders contained in para 17.4 of the order. Their names are at serial nos.11, 12 and 31.

5. Paras 17 is titled as 'Order', in para 17.1 reasons are set out for issuing various directions against key operators, financiers, DPs and Depositories. Para 17.1 reads as under:

"In view of the grave emergency arising out of the conduct of parties with the added risk that such devious practices, if unchecked, would be continued with impunity in future, there is a need for immediate regulatory intervention. In the wake of the interim orders in the case of Yes bank and IDFC IPOs there has been a spate of public complaints alleging manipulation in IPO's and urging immediate action from SEBI for protecting the retail investors. Also there is a heightened investors' concern on the IPO's as reflected in the tenor of demands made on SEBI, and the same calls for a timely response from SEBI as regulator to restore the confidence of the retail investor. Amidst such public expectations, coupled with due regard to the fact that number of IPO's are in the wait for entry into the securities market, which need to be insulated from the manipulators of the various entities as mentioned in this order by suitably restraining them from participation in the ensuing IPO's which has acquired a sense of urgency and which cannot brook the normal delay of quasi judicial proceedings for taking a decision, there is an imperative need to pass the **present interim order** to protect the market particularly the IPO's from being preyed on by predatory manipulators. Further, if the entities, as prima facie found to be instrumental in tilting the IPO allotment process to their favour by the intricate modus operandi as clearly seen in the findings of this order, are allowed to operate in the market any more, the same is fraught with immense mischief and incalculable damage to IPO

> allotment process besides undermining the confidence of the retail investors who are urging for a flair deal in the market free of such manipulators. Also SEBI has to reckon with the present booming market while formulating a course of action as decided in this order. Therefore, with a view to protect the interest of investors and securities market from further such acts, in exercise of the powers delegated to me by the SEBI Board in terms of section 19 of the Securities and Exchange Board of India Act, 1992 read with Section 11, 11B and 11(4)(b) thereof and section 19 of Depositories Act, 1996, pending inquiry and passing of final order, I hereby issue the following directions, **by way of ad interim, ex parte order**: (emphasis supplied)

6. The learned senior counsel Mr.K.B. Trivedi appearing with Ms.Dharmishtha Raval, the learned advocate appearing for the petitioners submitted that the order passed by SEBI is without any authority and is beyond the scope of section 11 of the SEBI Act. The learned senior counsel submitted that section 11 of the SEBI Act provides for functions of the Board. Section 11 of the SEBI Act is in Chapter IV which provides for “powers and functions of the Board”. He submitted that subsection (1) of section 11 provides that, 'subject to the provisions of this Act, it shall be the duty of the Board to protect the interest of the investors in securities and to promote the

development of and to regulate the securities market, by such measures as it thinks fit'. The learned senior counsel submitted that, 'section 11(4) of the SEBI Act does empower SEBI to suspend trading of any security in a recognised Stock Exchange'. It also empowers SEBI, 'to restrain the persons from accessing securities market and prohibit any person associated with securities market to buy, sell or deal in securities'. But then he submitted that before SEBI resorts to any of those measures it has to observe certain conditions which according to him are the 'conditions precedent' and they are prescribed in subsection (4), which read as under:

> Section 11(4)
>
> "Without prejudice to the provisions contained in subsections (1), (2), (2A) and (3) and section 11B, the Board may, by an order, for reasons to be recorded in writing, in the interest of investors or securities market, take any of the following measures, either pending investigation or inquiry or on completion of such investigation or inquiry, namely: - "

The learned senior counsel for petitioners submitted that in the entire order which is extensive enough running into 252 pages, there is no whisper that, 'an investigation or inquiry was undertaken against the present petitioners'. The learned senior counsel

submitted that as no investigation or inquiry is undertaken, there is no question of completion of such investigation or inquiry and that being so, there is no reason to resort to any measures, including that of restraining the petitioners from accessing the securities market and prohibiting the petitioners from buying, selling or dealing in securities.

7. The learned senior counsel for petitioners submitted that subsection (4) of section 11 was placed on the Statute Book by an Amending Act of 2002 and it came into force 29th October 2002. He submitted that it is equally important to note that it was by this Amending Act of 2002 that section 11(C) was also brought on the Statute Book. This section 11C of the Act pertains to “investigation”. Investigation provided under section 11C of the Act is detailed out in that provision.

Subsection (1) of section 11C provides for the contingency in which the SEBI is to resort to investigation. It is provided that where the Board has reasonable ground to believe that there exist certain contingencies, set out in clauses (a) and (b), the Board may, at any time by order in writing, direct any person to investigate the affairs. He submitted that thus it is clear that the SEBI has to have first in point

of time, a reasonable ground to believe that contingencies contemplated under clauses (a) and (b) are in existence and therefore, an investigation is warranted. Clauses (a) and (b) of subsection (1) of section 11(C) read as under:

> "11C Investigation
>
> (1) Where the Board has reasonable ground to believe that --
>
> (a) the transactions in securities are being dealt with in a manner detrimental to the investors or the securities market; or"
>
> "(b) any intermediary or any person associated with the securities market has violated any of the provisions of this Act or the rules or the regulations made or directions issued by the Board thereunder."

The learned senior counsel for petitioners submitted that in the present case order under challenge is dated 27th April 2006, whereas petitioner no.1, the notice under Rule 4 of SEBI (Procedure for Holding Inquiry and Imposing Penalties by Adjudicating Officer) Rules, 1995 served to him is dated 15th June 2006. He submitted that with full responsibility he is making a statement at the Bar that prior to 15th June 2006 notice, no notice worth name was served to the petitioners. He submitted that

therefore, on the face of it, order dated 27th April 2006 is not as contemplated under subsection (4) of section 11 of the SEBI Act.

8. The learned senior counsel submitted that even at the cost of repetition he has to reiterate that no investigation was commenced against the petitioners before passing of the order under challenge dated 27th April 2006, that being so there is no question of any 'investigation being pending'.

He submitted that to assume for a while that the petitioners advanced funds to some persons, that by itself is no offence as 'advancing funds' is not prohibited. He emphatically submitted that the petitioners have not indulged in any 'prohibited activity', much less an 'illegal activity'.

He further submitted that the funds advanced by the petitioners is returned either by cheque or in the form of shares. He submitted that this act of 'return of fund' and act of 'receiving the same' is again not 'prohibited' under any law then where is the question of the petitioners having indulged in an activity which is 'detrimental' either to 'investors' or the 'securities

market'. The learned senior counsel in this regard, invited attention of this Court to paras 31 and 32 of the rejoinder affirmed by Shri Rajan Vasudevbhai Dapki, petitioner no.1 on 24th June 2006. Relevant part reads as under:

> “.. .. the data referred to above will at the highest only demonstrate that the petitioners may have given finances to certain entities. It is submitted that giving of finances is an activity which is not prohibited by any provisions of the securities laws. Even assuming without admitting that the moneys have been given for financing of IPOs that also is not an activity which is prohibited, by any laws. Even the Banks carry on business of providing finances permitting applications in the IPO. Financing of IPOs is legitimate activity. The fact of giving finances does not in any way prove that the petitioners are part of the scheme whereby a modus operandi has been adopted to corner the retail allotment and make it big games (sic., gains) on sale immediately before or after listing.”

The deponent in para 32 has stated that,

> “.. .. entering into transactions, which are off market transactions are not illegal transactions. The Securities Contract Regulation Act permits transactions of Spot basis outside

> the stock exchange. The off market transactions are recognised even by the National Securities Depository Ltd. (NSDL). The bye-laws of NSDL provides for and recognises off market transactions. It is submitted that the rules and bye-laws of NSDL are approved by SEBI. It is submitted that the delivery instructions slip prescribed by NSDL has a separate column for off market transactions and transactions which are entered into on the Stock Exchange. .. .."

9. The learned senior counsel submitted that though the order under challenge runs into 252 pages there is no evidence against the petitioners showing that the petitioners have indulged in an activity, detrimental to the 'investors' or 'securities market'. He submitted that the SEBI has not set out any evidence in the order which will go to show that the petitioners are part of the 'scheme' opening large number of multiple dematerialsed accounts with common addresses, making applications in the retail category for small value so as to be eligible for allotment, subsequently transferring the shares to the 'key operators', who in turn transfer the shares to the 'financiers', who originally made funds available for the same and then, acting as mere opportunist sold those shares making a killing profit on the date of listing.

10. The learned senior counsel for petitioners submitted that the order refers to violation of different regulations. He submitted that para 16.103 reads as under:

> "The findings of investigations so far, prima facie, reveal violations of serious nature by the key operators, their financiers, concerned DPs, Karvy group and the depositories including violation of Regulation 3 of SEBI (Prohibition of Fraudulent and Unfair Trade Practices Relating to Securities Markets) Regulations, 2003, Regulation 42(2), 42(3), 43, 46 and 52 of SEBI (Depositories and Participants) Regulations, 1996 and clauses 3, 9, 12, 16, 19, 20 and 22 of the Code of Conduct specified in Regulation 20(a) of SEBI (Depositories and Participants) Regulations, 1996 and the provisions of Depositories Act, 1996 and Provisions of SEBI Disclosure and Investor Protection Guidelines, 2000."

The learned senior counsel for petitioners submitted that in the entire order, there is no reference to the role of the petitioners or the act of the petitioners, which constitutes breach or violation of one or more the aforesaid regulations.

11. The learned senior counsel for petitioners submitted

that para 16.104 of the order impugned records that, “investigations are being completed .. .. “ He submitted that the order does not specify as to which investigation and as to whether the investigation referred to in para 16.104 is against the petitioners and therefore, he submitted that, the order passed against the petitioners be quashed by this Court.

12. The learned senior counsel submitted that Regulation 5 of SEBI (Prohibition of Fraudulent and Unfair Trade Practices Relating to Securities Markets) Regulations, 2003 also refers to 'investigation'. He submitted that, 'the Board', 'Chairman', 'member' or 'Executive Director', as and when has reasonable ground to believe that in any 'transaction' securities are dealt in such a manner, which detrimental to the 'investors' or 'securities market', which is in violation of these Regulations, then in that case it is open for the Board to direct by an order in writing, any officer to investigate the affairs of such 'intermediaries' or the 'persons associated with securities market' or 'any other person', and report to the Board, for which the method is prescribed under section 11C of the SEBI Act.

The learned senior counsel further submitted that Regulation 6 provides for 'powers of the investigating authority', whereas Regulation 8 casts duty to cooperate. Regulation 9 provides submission of report to the Board and on such submission of the report under Regulation 10 it is for the Board to effect enforcement.

But then he submitted that in Regulation 10 it is provided that, 'the Board after giving reasonable opportunity of hearing to the persons concerned, issue such directions or take such action as mentioned in Regulations 11 and 12. He submitted that in the present case the Board has not undertaken any investigation against the petitioners and therefore, there is no question of the same being completed.

13. The learned senior counsel submitted that the petitioners do not dispute the powers of SEBI to issue such directions, even by dispensing with pre-decisional hearing. But then the order issued against the petitioners is not issued after complying with the necessary provisions of law.

The learned senior counsel for petitioners submitted that under clause (d) of subsection (4) of section

11 of SEBI Act, the SEBI has power even to retain the proceeds of securities of a transaction under investigation. But then, he submitted that the power is to retain the proceeds or securities of only those transaction which is under investigation. He submitted that thus the action of the SEBI restraining the petitioners from selling the securities, which are not connected to the IPOs mentioned in the order, is certainly without any authority of law.

The learned senior counsel also submitted that clause (e) of subsection (4) of section11 empowers the SEBI to even attach the Bank Account, with prior approval of the Judicial Magistrate. But then, he submitted that it also goes without saying that the 'Bank Accounts' which could be attached must be that of a person/s who is/ are involved in violation of the provisions of the Act, Rules or Regulations. The learned senior counsel for the petitioners submitted that still the SEBI is not empowered to pass order whereby the securities which are not under investigation can be retained, impounded or

attached.

14. The learned senior counsel next submitted that the tenor of the order under challenge is clear. Its focus is on two IPOs, one of “Yes Bank” and another of 'IDFC'. The order then proceeds to record the object for which order is passed. It is recorded in the order, i.e. 'to see that the ensuing IPOs are not manipulated', He submitted that, that being so, the order of SEBI putting total restriction and prohibiting the petitioners from buying and selling even in the secondary market is certainly beyond “the object” mentioned in the order itself. He submitted that the restriction imposed on the petitioners prohibiting them from dealing in the secondary market is concerned has no nexus with 'the object' for which the order is passed. He submitted that the total ban/ restriction/ prohibition on selling the shares acquired by the petitioners, prior to the IPOs, referred to in the order is not only unjust and harsh, but an arbitrary one and by any standard 'disproportionate'.

15. The learned senior counsel for petitioners submitted that earlier this Court had an occasion to deal with the provisions of sections 11 and 11B of the SEBI Act, in the matter of **Alka Synthetics Ltd. Vs. Securities and Exchange Board of India (SEBI) & others**, reported in 1997 (3) GCD 88 (Gujarat). He submitted that this Court while considering the matter had observed that, 'the order made, without affording an opportunity of hearing, on the ground that the orders are not by way of penalty, but for restoring the market condition, in absence of any statutory provisions to exclude the principles of natural justice, stand vitiated on account of non compliance of the principles of natural justice'. He submitted that this Court was pleased to hold that, 'the post-decisional hearing, including appeal against the order cannot cure the invalidity attached to the order made without adhering to the principles of natural justice'. The learned senior counsel in support of his submissions relied upon paras 39, 40, 41 and 44.

So far as sections 11 of the Act is concerned he

relied upon paras 202, 206, 207, 211 and 234.

16. The learned senior counsel for petitioners submitted that, 'the concept of proportionality is not unknown to the field of administrative law', and the same is required to be considered even in the present case as the order passed by the SEBI is in the nature of administrative order. In this regard he relied upon a decision of the Hon'ble the Apex Court in the matter of the **Union India and another Vs. G. Ganayutham**, reported in (1997) 7 SCC 463. The learned Advocate General invited attention of the Court to paras 15, 16 and 33.

The learned senior counsel submitted that if the order under challenge is perused, it deals with only 'IPOs' (Initial Public Offers). He submitted that the first para of the order wherein the background in which the order is passed is set out, the relevant part reads as under:

> “In October 2005, the Stock exchanges submitted their preliminary observations on the IPO of Yes Bank Ltd. (YBL) which hinted

> at the possibility of large scale off-market transactions immediately following the date of allotment and prior to the listing on the stock exchanges. SEBI therefore carried out a preliminary scrutiny by calling for data from the depositories and the Registrar to the Issue (RTI). It was found that large number of multiple dematerialised accounts with common addresses were opened by a few entities. On noticing the irregularities and widespread abuse, SEBI acted against the entities who were responsible for the irregularities by passing interim order restraining them from participating in all future IPOs and also directing the depositories to effectively freeze their dematerialized accounts. Close on the heels of the order in the case of Yes Bank IPO, SEBI examined the dealings in another major IPO of IDFC wherein the very same players were suspected to have played a major role in cornering the shares. SEBI issued ad interim orders in the case of IDFC also along the similar lines as done in the case of Yes Bank."

17. The learned senior counsel submitted that at various places the order refers to the IPOs. Even in the operative part of the order where 'the object' is reiterated, its relevant part reads as under:

> “17.1 .. .. In the wake of the interim orders in the case of Yes Bank and IDFC IPOs there has been a spate of public complaints alleging manipulation in IPO's and urging immediate action from SEBI for protecting the retail investors. Also there is a heightened investors' concern on the IPO's as reflected in the tenor of demands made on SEBI, and the same calls for a timely response from SEBI as regulator to restore the confidence of the retail investor. Amidst such public expectations, coupled with due regard to the fact that **number of IPO's are in the wait for entry into the securities market, which needs to be insulated from the manipulators of the various entities as mentioned in this order by suitably restraining them from participation in the ensuing IPO's** which has acquired a sense of urgency and which cannot brook the normal delay of quasi judicial proceedings for taking a decision, there is an imperative need to pass the present interim order **to protect the market particularly the IPO's** from being preyed on by predatory manipulators. .. ..” (emphasis supplied)

18. The learned senior counsel submitted that, if that is so, then SEBI should have restricted its order only to those securities in which 'manipulation' is alleged and the ensuing IPOs. He submitted that in the 'entire order' there is not a single word which can justify the 'total ban' on various parties including the petitioners,

who are branded as financiers. He submitted that his act becomes grave when appreciated by applying the 'principle of proportionality'. He submitted that by any standard, 'total ban' on the petitioners from operating even in the securities market is disproportionate to the allegations made against the petitioners even if the same are assumed to be true. He submitted that a hammer cannot be used to kill a fly. If at all the petitioners are guilty of the manipulations alleged against them, there has to be proportionate action against the alleged manipulations and not a 'total ban'. He submitted that this total ban has caused tremendous hardship and unascertainable loss, because the securities market is a market which is unlike any other market is fluctuating not only everyday but even more frequently than that. There everything turns on spontaneous decision of purchasing and selling of the securities. He submitted that putting a 'total ban'/ prohibition on the petitioners is besides being unjust and arbitrary, is uncalled for even if the allegations against the petitioners are assumed to be true.

19. The learned senior counsel for petitioners at this juncture submitted that there is a consensus with some modifications here and there amongst the petitioners of all these petitions that, 'the petitioners if could be restrained from participating only in all future IPOs

and the securities of the IPOs which are referred to in the order and allowed to deal with the securities which the petitioners are holding prior to the alleged scam and the securities which are no way related to the IPOs referred to in the order.

20. Other learned senior counsels and advocates appearing in the other matters adopted the arguments/ submissions made by the learned senior counsel Mr.K.B. Trivedi. Besides, they made some additions in their individual petitions, like learned senior counsel Mr.K.S. Nanavati appearing in Special Civil Applications No.10527 of 2006 and 10524 of 2006; Mr.M.D. Pandya, the learned Senior Counsel appearing in Special Civil Applications No.10529 of 2006; Ms.D.N. Raval, the learned advocate appearing in Special Civil Applications No.10528 of 2006 and 9971 of 2006; Mr.Sanjay A. Mehta, the learned advocate appearing for the petitioner in Special Civil Application No.10516 of 1006; Mr.G.N. Shah, the learned senior advocate appearing in Special Civil Application No.10756 of 2006.

The main gist of the additions made by all these learned senior counsels and learned advocates for petitioners is that, 'the order is not passed after complying with the requirements of the conditions precedent, namely, 'pending investigation/ inquiry' and that 'the order is

disproportionate to the allegations made', even if the same are assumed to be true.

21. The learned senior counsel Mr.K.S. Nanavati appearing for petitioners in Special Civil Applications No.10524 of 2006 and 10527 of 2006 submitted that though the matter is already argued very ably, at length by learned senior counsel Mr.K.B. Trivedi; in addition to his submissions, he will like to make following submissions:

that no inquiry/ investigation is initiated against the petitioners and no hearing is granted to the petitioners.

The learned advocate referring to the draft amendment moved in these two petitions, referred to paras B2, B3, B4, B5, B8 and B-11 of the Draft Amendment.

He submitted that on behalf of the petitioners efforts have been made for seeking hearing and clarification from the respondent. A representative of the petitioners visited the office of the respondent and spent hours sitting in the office of the respondent. However, the petitioners could not succeed in getting hearing from the respondent. He submitted that the petitioners have not yet been given hearing by the respondent. He submitted that the petitioners believe that as petitioners are not

'substantial investors' they are not getting hearing, as was obtained by 'India Bulls Securities Limited'. He submitted that the order passed against India Bulls Securities Limited is put in abeyance after hearing it. He submitted that India Bulls Securities Limited is having business worth thousands of crores of rupees and its activities have a broader impact on the securities market.

The learned senior counsel submitted that out of 105 IPOs the petitioners have financed only in one IPO of TCS Limited. He submitted that this shows the extent to which the petitioners, if at all, can be said to have any role in the so called scam.

The learned senior counsel submitted that as consequence of the impugned order the 'Demat Account/s of the petitioners are frozen. The Account/s also consist/s of credits securities which are not part of 105 securities which have been investigated by the respondent. He submitted that this freezing of account of the petitioners has detrimental effect on the petitioners' ability to sell the securities, even those securities which were acquired prior to 2003. He submitted that the intimation received from NSDL is at Annexure 'C' in Special Civil Application No.10527 of 2006.

22. The learned senior counsel for the petitioners submitted that the respondent by its order dated 15th December 2005, passed after carrying out investigation in the alleged manipulations of the IPO of Yes Bank Limited, has restrained the persons named in the order from buying, selling and dealing in shares of Yes Bank Limited and other ensuing IPOs. He submitted that unlike the order under challenge in these petitions by order dated 15.12.2005 the persons named in the order are not restrained from trading in the secondary market or buying, selling or dealing in other securities. He submitted that the respondent by order issued in the case of IDFC Limited has restrained the persons named in the order from buying, selling or dealing in shares of IDFC Limited, other future IPOs only. Whereas, in the case of the petitioners, the petitioners are restrained from dealing in any securities as their accounts are frozen.

The learned senior counsel reiterated that though it is mentioned in the impugned order that the respondent has conducted a detailed investigation in the misuse of IPO process and that investigations are being completed, no further investigations have been initiated against the petitioners. He submitted that therefore, as submitted by the learned senior counsel Mr.K.B. Trivedi, the respondent has no jurisdiction under section 11(4)(b) to pass orders prohibiting the petitioners from buying,

selling or dealing in securities.

The learned senior counsel submitted that the respondent has recorded adverse findings holding the petitioners guilty of various acts even though investigations against the petitioners specifically are yet to be initiated. The petitioners are never heard nor granted an opportunity of being heard.

23. The learned senior counsel referred to and relied upon a decision of the Hon'ble the Apex Court in the case of Godawat Pan Masala Products I.P. Ltd. & another Vs. Union of India and others, reported in (2004) 7 SCC 68. He referred to paras 48 and 49 and submitted that the impugned order is violative of the fundamental rights guaranteed under Article 19(1)(g) of the Constitution of India as it is excessively restrictive in nature.

He submitted that in para 49 the Hon'ble the Apex Court has referred to its earlier judgement in which the nature of a 'reasonable restriction' on the fundamental rights under Article 19(1)(g) of the Constitution is dealt with. The Hon'ble the Apex Court has reproduced para 10 from the judgement in the matter of Mohd. Faruk Vs. State of M.P. reported in (1969) 1 SCC 853. For ready perusal, para 49, wherein para 10 is quoted is reproduced hereinbelow:

"While dealing with the nature of a reasonable restriction on the fundamental rights under Article 19(1)(g), this Court observed in Mohd. Faruk v. State of M.P. as under: (SCC p.857, para 10)

“10 The impugned Notification, though technically within the competence of the State Government, directly infringes the fundamental right of the petitioner guaranteed by Article 19(1)(g), and may be upheld only if it be established that it seeks to impose reasonable restrictions in the interest of the general public and a less drastic restriction will not ensure the interest of the general public. The Court must in considering the validity of the impugned law imposing a prohibition on the carrying on of a business or profession, attempt an evaluation of its direct and immediate impact upon the fundamental rights of the citizens affected thereby and the large public interest sought to be ensured in the light of the object sought to be achieved, the necessity to restrict the citizen's freedom, the inherent pernicious nature of the act prohibited or its capacity or tendency to be harmful to the general public, the possibility of achieving the object by imposing a less drastic restraint, and in the absence of exceptional situations such as the prevalence of a State of emergency - national or local - or the necessity to maintain essential supplies, or the necessity to stop activities inherently dangerous, the existence of a machinery to satisfy the administrative

> authority that no case for imposing the restriction is made out or that a less drastic restriction may ensure the object intended to be achieved."

24. Mr.M.D. Pandya, the learned senior advocate appearing in Special Civil Application No.10529 of 2006 for the petitioner submitted that by order dated 20th January 2006, SEBI appointed the Chief General Manager to investigate into the affairs relating to buying, selling or dealing in the shares of the IPOs during the period 2003-05.

The learned advocate submitted that in the said order it is recorded that, “SEBI is further satisfied that in the interest of investors and in public interest/ securities market, no notice to the persons to be investigated should be given and therefore, it is ordered that in terms of the provisions of the said rules, regulations and guidelines the above investigation may be conducted without such notice”.

The learned advocate submitted that neither in the earlier part of the order nor in the aforesaid para, SEBI has set out any reasons for dispensing with the 'observance of the principles of natural justice'. Not only that no reasons are recorded, which will give an indication of the working set of the mind of the SEBI.

The learned advocate submitted that in fact an order unless it sets down the reasons, it is not possible to understand and appreciate as to what is passing in the mind of the authorities while passing the order and therefore, it is always necessary that the reasons must be set out so that any person who reads the order can find out as what weighed with the authority in passing the order.

In this regard, the learned advocate relied upon a decision of the Hon'ble the Apex Court in the matter of **Union of India Vs. M.L. Capoor and others** reported in A.I.R. 1974 SC 87. The learned advocate relied upon the observations of the Hon'ble the Supreme Court in para 28, the relevant part of which reads as under:

> "Reasons are the links between the materials on which certain conclusions are based and the actual conclusions. They disclose how the mind is applied to the subject matter for a decision whether it is purely administrative or quasi judicial. They should reveal a rational nexus between the facts considered and the conclusion reached. Only in this way can opinions or decisions recorded be shown to be manifestly just and reasonable. We think that it is not enough to say that preference should be given because a certain kind of process was gone through by the Selection Committee. This is all that the supposed statement of reasons amounts

to. .. ..”

25. The learned advocate Mr.Pandya submitted that if the case of the petitioners of Special Civil Application No.10529 of 2006 is taken into consideration it will show that the SEBI has not applied its mind to the facts of the individual petitioners. He submitted that in the affidavit in reply filed by Shri S. Madhusudhanan on behalf of the respondents, in para 7 it is stated that,

> “.. .. During the investigation, it was found that large numbers of multiple dematerialised accounts with common addresses were opened in the name of benami or fictitious entities and/ or persons by a few operators who have played major role in cornering the shares meant for retail investors. .. ..”

The learned advocate submitted that similarly, in para 10 of the affidavit, 'para 3' of the order is quoted, wherein further actions taken by SEBI consequent to the orders passed are mentioned. In para 11 of the affidavit para 5.4 of the order is referred to. Likewise, in para 12 of the affidavit, para 17.1 of the order is referred to.

26. The learned senior counsel for petitioners submitted that the petitioners of Special Civil Application

No.10529 of 2006 had purchased the shares of three companies on or after the date of listing and the purchase price was higher than the listing price. He submitted that if that is so, then it is not correct to brand the petitioners of Special Civil Application No.10529 of 2006 as 'financier' and pass an order which has a strangulating effect on the petitioners. He submitted that the order is required to be quashed and set aside by this Court at an earliest opportunity.

27. In Special Civil Application No.9971 of 2006, Ms.D.N. Raval, the learned advocate appearing for the petitioner submitted that so far as this petitioner is concerned, in para 11 of the memo of petition the role played by the petitioner herein is set out. Para 11 reads as under:

> "It is submitted that the petitioner has not given any money for the purposes of subscribing to any of the issues mentioned by the respondent in its order. The petitioner has not given any money for financing the public issue of Suzlon Energy Ltd., FCS Software Ltd. and Sasken Communication Ltd. The petitioner bought the shares referred to by the respondent in its order on spot basis from Roopalben

> Panchal. It is only after the shares were delivered to the petitioner that petitioner made payment to Roopalben Panchal. The petitioner further sold the shares on spot basis to various entities. It is stated that the petitioner as an investor buys and sells shares. He is neither a sub-broker nor a broker but an investor in the securities market." (emphasis supplied)

28. The learned advocate for the petitioner submitted that the grounds on which the order dated 27th April 2005 is challenged are set out in para 12.

The learned advocate emphatically submitted that the profit which is alleged to have been pocketed by the petitioners and other financiers of Roopal Panchal is calculated by multiplying the difference between the issue price and closing price on the date of listing to the number of shares multiplied. The learned advocate submitted that the authorities have not taken trouble to find out, either by seeking information from the petitioner or from anybody as to whether the shares, obtained by petitioner were really sold on the date of listing or not. She submitted therefore, the so called 'gain' of the financiers is only 'hypothetical' and 'not real'. She also submitted that if the authorities had

taken little trouble to know they could have known the fact as to whether on the date of listing the shares were sold or not. She submitted that without taking such trouble the authority has projected the profit running into not only in 'lakhs' but in some case 'crores'.

The learned advocate submitted that this shows the 'the bent of mind' and to an extent 'the prejudice' with the authorities have acted in the entire matter. The learned advocate submitted that in fact there is a calculated attempt on the part of the authorities to prejudice the Court by stating that, 'the shares were obtained before the date of listing and were sold soon on listing of these shares at the stock exchange. The learned advocate submitted that to be precise the case of the authorities is not that 'the petitioners and other financiers sold their shares on listing or thereafter and by doing so pocketed the profit'. The order proceeds only on three data, namely, (i) number of shares obtained by the petitioners and other similarly situated persons, (ii) issue price of the shares, and (iii) closing price on the date of listing. The learned advocate submitted that, 'the important factum of the shares being sold is missing. Still the figures are projected as if such huge profits are pocketed or the gain is forked out of the

market.

29. Mr.Sunit Shah, the learned advocate appearing with Mr.G.N. Shah, learned advocate for petitioner in Special Civil Application No.10576 of 2006 submitted that besides the arguments made by Shri K.B. Trivedi, learned senior counsel and other learned senior counsels in the matter, he wish to point out that the petitioner in Special Civil Application No.10576 of 2006 is 'holding shares in the capacity of a trustee' besides holding shares in his personal capacity. He submitted that the petitioner though holding shares in the joint name, he is not the owner of those shares. He submitted that such material aspects are not taken into consideration by the respondents while imposing a total prohibition on buying and selling of securities. He submitted that overlooking of such glaring facts itself is sufficient to call for interference at the hands of this Court.

30. The learned senior counsel Mr.Mihir Joshi appearing with Mr.Bijal Chhatrapati and Mr.Jay Amin for M/s Singhi & Co. for the respondent-SEBI emphatically submitted that, 'the matter is not that simple as is sought to be projected by the learned senior counsel and the learned advocates for the petitioners.

He submitted that to start with, the attempt made to divide one single transaction consisting of various actions, which are required to be taken together, as they produced particular impact on the IPOs, retail investors and on the overall temperament of the market is required to be examined in its true perspective. He submitted that the learned senior counsels for the petitioners have divided the series of actions in such a manner that every action when taken as a single action does not attract any prohibition of law. He submitted that it is over-simplification of the matter when it is submitted that, 'to earn profit is not prohibited by law', 'to purchase shares is not prohibited by law' and as the petitioners have only done this they have not indulged in any activity which is prohibited by law. Once this is accepted then order passed by SEBI is not only uncalled for but is required to be quashed and set aside, without allowing it to be operative even for a minute more.

31. The learned senior counsel for the respondents submitted that though order under challenge is read and re-read, he may also be permitted to read para 1.1 which sets out the background in which SEBI was constrained to undertake the whole exercise. He submitted that there is

no dispute about the duties assigned to the SEBI and it is only in discharge of these duties that the SEBI undertook the entire exercise. The learned senior counsel for respondents submitted that it is not only the SEBI but other authorities like RBI and such other institutions, who owe a duty to see that there is no unwarranted manipulation in the market, have undertaken a similar exercise. It is only after a deep rooted investigation, in which a huge scam is unearthed and taking into consideration the same the order is passed.

The learned senior counsel submitted that it is argued by the learned senior counsels for the petitioners that there was no investigation directed against any of the petitioners in their individual capacity and therefore, 'condition precedent' is not fulfilled. He submitted that if such narrow meaning is given to the term 'pending investigation and inquiry' then it will render majority of the provisions to be redundant.

32. The learned senior counsel for respondents invited attention of the Court to para 1.1, which reads as under:

> “1.1 As a part of ongoing surveillance activity by SEBI into the various aspects of

working of securities market, SEBI had initiated probe and advised BSE and NSE to look into the dealing in the shares issued through Initial Public Offerings (IPOs) before the shares are listed on the stock exchanges. For the purpose of the examination, the off-market transactions data as obtained from the depositories were provided by SEBI to the stock exchanges. In October 2005, the Stock Exchanges submitted their preliminary observations on the IPO of Yes Bank Ltd. (YBL) which hinted at the possibility of large scale off market transactions immediately following the date of allotment and prior to the listing on the stock exchanges. SEBI therefore carried out a preliminary scrutiny by calling for data from the depositories and the Registrar to the Issue (RTI). It was found that large number of multiple dematerialised accounts with common addresses were opened by a few entities. On noticing the irregularities and widespread abuse, SEBI acted against the entities who were responsible for the irregularities by passing interim order restraining them from participating in all future IPOs and also directing the depositories to effectively freeze their dematerialized accounts. Close on the heels of the order in the case of Yes Bank IPO, SEBI examined the dealings in another major

IPO of IDFC wherein the very same players were suspected to have played a major role in cornering the shares. SEBI issued ad interim orders in the case of IDFC also along the similar lines as done in the case of Yes Bank.

1.2 In the course of investigations pursuant to interim orders in the cases of Yes Bank and IDFC, SEBI has noticed that some of these multiple accounts were opened in June 2003. The involvement of these accounts in Initial Public Offerings prior to that of Yes Bank and IDFC were looked into." (emphasis supplied)

33. The learned counsel senior counsel for respondent submitted that it is from the investigation, undertaken by SEBI it is found that afferent account, through operator passed on the shares to financiers, who sold them soon after listing. The learned counsel invited attention of the Court to paras 9.6 and 9.7 which say that,

"9.6 In this context it may be mentioned that the verification done by CDSL does not include closed/ frozen accounts and

> accordingly, Karvy-DP which had closed as many as 38,409 accounts held with CDSL during the course of the verification of genuineness of account-holders sharing common addresses does not appear in the table given above. The details of these demat accounts closed by Karvy-DP have been discussed in detail elsewhere in this order.
>
> 9.7 It is seen that while Karvy DP had closed 38,409 CDSL demat accounts during the course of verification, 20,399 CDSL dematerialized accounts of Karvy DP had served as afferent accounts for abusing the IPO process. Thus, it follows that 18,010 suspect demat accounts with Karvy DP were probably meant to be used in later IPOs."

The learned senior counsel for respondents submitted that so far as NSDL is concerned the details about NSDL are given in para 9.11 which reads as under :

> "9.11 The verification by NSDL regarding genuineness of dematerialized account-holders revealed that there were 56216 dematerialized accounts wherein 20 or more account-holders were having common addresses. These 56216 demat accounts were held with 105 DPs. The details of the 21 DPs wherein 500 or more account-holders were sharing common addresses is given below:"

34. The learned senior counsel for respondent submitted that it is on the basis of detailed investigation that the SEBI identified the persons/ entities who played role in 'afferent accounts', 'master account-holders'/ 'key operators', and 'financiers'. It is only after having obtained the material, which is tabulated in the order that the SEBI thought it fit to exercise its power and pass order under challenge in these petitions. The learned senior counsel for respondents emphatically submitted that, it is not the case of SEBI that investigation undertaken by SEBI is 'full and final'. He submitted that looking to the scale on which irregularities were committed, to start with SEBI took '500' or more credits in the account of the persons concerned as the 'cut off line' and it is by applying that criteria the persons, who are identified either as 'key operator' or 'financier' the action is taken against them. He submitted that a person who had only 499 credits in his account will not find his name in the list, but to start with, the SEBI had to have some criteria fixed and applied and it is on the basis of that criteria the details are collected. The details related to IPO-NSDL are set out in Table 5.7 (a). Similarly, in Table 5.7(b) details related to IPO-CDSL are set out. These tables reflect as to from how many

number of accounts the 'shares' were received. The learned senior counsel for respondents submitted that in Table 5.7(a) last but one column depicts 'number of credits' received in the account. Whereas, the last column depicts the number of shares received.

35. The learned senior counsel for respondents next invited attention of the Court to the fact that under SEBI (Disclosure and Investor Protection) Guidelines, 2000 (II.15) clause (xxiv-a) defines 'retail individual investors'. The clause is:

> "(xxiv-a) : Retail individual investor' means an investor who applies or bids for securities of or for a value of not more than Rs.1,00,000." [Earlier the amount was of Rs.50,000/-, which is increased to Rs.1,00,000 on 29th March 2005].

The learned senior counsel submitted that in para 6 of the order 'summary of major IPOs' is incorporated. He submitted that in para 6.5 details of over-subscription of IPO of Suzlon energy Limited are set out. To elaborate the ill design if the details are analysed it reveals that in the matter of 'retail portion', it was oversubscribed by 6.04 times whereas in 'non institutional portion' it was oversubscribed by 40.27 times.

He submitted that if the persons like the petitioners wanted to get the number of shares they have got, then they were required to apply for 40.27 times more number of shares for which they would have been required to pay also more in the category of 'non institutional portion'. Which they could obtain by indulging into a malpractice by subscribing only 6.04 times. He submitted that 'firstly' the petitioners and other similarly situated persons could not have got so many shares in the 'retail portion' without purchasing them from the open market. It was only with an 'ill design', that they could get such a large number of shares. He submitted that it was the in depth study which revealed that it was a calculated act on the part of the chain of persons to get undue gain which otherwise they could not have got. In this regard he invited attention of the Court to para 6.7 which reads as under:

> "The key operators who cornered the retail portion of Suzlon Energy IPO were Roopalben Nareshbhai Panchal, Dhaval A. Mehta, Purshottam Budhwani, Majojdev Seksaria, Jhaveri Securities Pvt. Ltd., Biren Kantilal Shah, Chandrakant Amratlal Parekh, Pratik Mafatlal Shah and Himani N. Patel. The above key operators have used 21,692 afferent accounts to corner 323023

shares representing 3.74% of the total number of shares allotted to the retail individual investors. Their financiers were Saumil A. Bhavnagari, Jayesh P. Khandwala HUF, Rajan Vasudev Dapki, Umang R. Shah, Chirag Jayendrakumar Shah and Sheelu Lalwani."

36. The learned senior counsel for respondents submitted that after having examined various aspects of the matter and having found that the petitioners have not acted as simple investors in buying the shares, and the volume of the transactions which took place between the date of allotment and the date of listing, made the SEBI to pass the order in question. The learned senior counsel submitted that the scale at which the irregularities were indulged in is reflected from the number of dematerialized accounts, which were found not to be genuine. The number is 56,216. In these dematerialized accounts there were cases wherein 20 or more account-holders had common address. It is also revealed during investigation that these 56,216 dematerialized accounts were held with 105 DPs. Out of these 105 DPs, 21 DPs are identified, which have 500 or more account-holders sharing common address. The details of those 21 DPs are set out in para 9.11 of the order.

The learned counsel for respondent submitted that the moment details of the 'financiers' who financed to the 'key operators' is perused, the case of the key operators that they are 'simple investors' falls to ground. They are not the “simple investors”, buying and selling securities in normal course. He submitted that the details of the 'financiers' are set out in para 10. Table 10.2 is the list of 'financiers' of M/s Roopalben Panchal, one of the key operators. The names of the petitioners of Special Civil Application No.10523 of 2006 and Special Civil Application No.10529 of 2006 are found therein. He submitted that these petitioners are identified as 'financiers' of M/s Roopalben Panchal in no uncertain terms. Therefore, the submission that there is no investigation carried out against these petitioners is not worth accepting. The learned senior counsel for respondent submitted that the size of table 10.2 shows the scale at which the matter was investigated. It also reveals the fact that the petitioners are involved as 'financiers'. The learned senior counsel submitted that it can be argued that, 'financing itself is not prohibited by law', but then it deserves to be rejected outright because when it has come on record that this 'financing' was with a view to gain profit by manipulation. In light of the facts on

record, it cannot be gain said that, 'as the financing itself is not prohibited under any law' the financing made by the petitioners does not attract any action.

The learned senior counsel for respondents submitted that similarly it is argued that, 'earning profit is not prohibited by any law', but then the profit earning should be only through the means which are recognised by law.

As an individual, the petitioners could have applied only for limited number of share in the 'retail segment'. T overcome that that difficulty, they adopted this dubious method of purchasing large number of shares by making use of fictitious/ benami account-holders, through key operators. They got the shares allotted to these fictitious and benami account-holders, who in turn transferred these shares. This mode of earning profit is not recognised by law.

The learned senior counsel for respondents submitted that so far the first and foremost argument of the learned senior counsel for the petitioners is concerned that, 'SEBI could not have passed any order under subsection (4) of section 11, unless there was either an

investigation or inquiry was pending' is misconceived. He submitted that the submission made by the learned senior counsel for the petitioners that the term 'investigation' used in subsection (4) of section 11 should be construed to mean that such investigation must be pending against a person, against whom an order is passed. To put it differently, an order can be passed only against such person against whom an investigation or inquiry is pending. He submitted that such a narrow meaning will not only frustrate the very object of the enactment but will cause miscarriage of justice. Subsection (4) of section 11 of the SEBI Act does not provide that 'a pending investigation' is a condition precedent for passing an order against a person. The learned senior counsel for respondents submitted that the correct interpretation is that if in an investigation which may not be against the petitioners, if it is revealed that the petitioners' role is detrimental to the investors and/ or securities market, SEBI is well within its bounds and power for discharging the functions/ duties assigned to it under the SEBI Act to pass an order against the petitioner. He submitted that in fact subsection (1) of section 11 of the SEBI Act says that,

“ .. it shall be the duty of the Board to

> protect the interests of investors in securities and to promote the development of and to regulate the securities market, by such measures as it thinks fit."

37. He submitted that it is the interest of investors which the Board has to keep in mind as the prime object. Besides, it has to promote development and regulate the securities. He submitted that the order impugned is passed with the aforesaid objects in mind. He submitted that the order is very clear and manifestly shows that it is only with a view to protect the interest of the investors and with a view to promote development and regulate the securities market it is passed.

The learned senior counsel for respondents submitted that the authorities have passed the order with open mind and therefore, while imposing restrictions which were felt urgent, the persons affected are called upon to file their objections. To that extent the order is in the nature of Show Cause Notice as mentioned in para 17.18, which reads as under:

> "This order shall be treated as show cause notice against the concerned entities named herein. The entities/ persons against whom this order is issued may file their objections, if any, to this order within 15 days from the date

> of this order and, if they so desire, avail themselves of an opportunity of personal hearing .. .."

38. The learned senior counsel for respondents submitted that none of the petitioners have filed their objections so far. Instead they have approached this Court complaining about the order shows that the petitioners are not interested in hearing.

At this juncture, the learned senior counsels appearing for the petitioners submitted that though the petitioners have written letters to SEBI for fixing a date of hearing and before that to supply documents which are relied upon for passing the order against them, but then the allegation is that the SEBI has not extended any cooperation to the petitioners by supplying necessary documents.

39. The learned senior counsel for respondents submitted that the law is clear. Under the law (SEBI Act) the SEBI has power to issue such directions, not only that it ha power to issue such directions even by dispensing with the per-decisional hearing. He submitted that such provisions are placed on the Statute Book with a definite purpose and the purpose is to see that before it is too

late for SEBI to take action against any person, who is acting in a manner which is detrimental to the investors and the securities market, action is taken. The learned senior counsel submitted that the order itself reveals that SEBI in its in depth investigation noticed that the role played by the petitioners is detrimental to the interest of the investors and hence to curb the same with immediate effect passed the order against the petitioners.

The learned senior counsel for respondents submitted that 'investigation' contemplated in subsection (4) of section 11 of the SEBI Act is not only qua an 'individual' but it can be 'into a transaction'. He submitted that section 11C of the SEBI Act provides for 'investigation'. Clause (a) of subsection (1) of section 11C of the SEBI Act reads as under:

> "(1) Where the Board has reasonable ground to believe that --
> (a) the transactions in securities are being dealt with in a manner detrimental to the investors or the securities market;"

Thus, it is clear that even a transaction can be a matter of investigation.

The learned senior counsel for respondents submitted that as submitted earlier, it cannot be disputed that SEBI has power 'to dispense with pre-decisional hearing'. That being so, having come to know about the role played by the petitioners, which can be said without any hesitation to be detrimental to the investors and securities market, SEBI has rightly passed the order impugned.

40. The learned senior counsel for respondents submitted that some of the learned senior counsels appearing for some of the petitioners have submitted that in some cases SEBI has varied the order/s, and has thus, accorded discriminatory treatment to the petitioners as in their case the order under challenge is not varied. He submitted that this on the contrary shows the unbiased approach of the SEBI. He submitted that it should be appreciated that SEBI has not acted with any bias. He referred to SEBI (Prohibition of Fraudulent and Unfair Trade Practices Relating to Securities Markets) Regulations, 2003, of which Regulation 3 provides for prohibition of certain dealings in securities, Regulation 4 provides for prohibition of manipulative, fraudulent and unfair trade practices. Regulation 5 provides for power of the Board to order investigation. He submitted that when the Board, Chairman, Member of

Executive Director have reasonable ground to believe that, (a) the transactions in securities are being dealt with in a manner detrimental to the investors or the securities market in violation of these regulations, it may, at any time by order in writing, direct any officer to investigate the affairs of such intermediary persons associated with the securities market or any other person and to report thereon to the Board in the manner provided in section 11C of the Act. He submitted that in the present case also the Board having reason to believe that certain transactions are taking place, which are detrimental to the securities market, an investigation was ordered and in the course of that investigation when it come to surface that the role played by the petitioners is detrimental to the investors and the securities market, the order impugned is passed.

The learned senior counsel for respondents submitted that Regulation 10 provides for enforcement by the Board. Regulation 10 reads,

> “The Board may, after consideration of the report referred to in regulation 9, if satisfied that there is a violation of these regulations and after giving a reasonable opportunity of hearing to the persons concerned, issue such directions or take such action as mentioned in regulation 11 and regulation 12:”

The second proviso of Regulation 10 provides that,

> "Provided further that the Board may, in the interest of investors and securities market, dispense with the opportunity of pre-decisional hearing by recording reasons in writing and shall give an opportunity of post-decisional hearing to the persons concerned as expeditiously as possible."

41. The learned senior counsel for respondents submitted that in the order impugned in para 16.103 it is recorded that:

> "The findings of investigations so far, prima facie, reveal violations of serious nature by the key operators, their financiers, concerned DPs, Karvy group and the depositories including violation of Regulation 3 of SEBI (Prohibition of Fraudulent and Unfair Trade Practices Relating to Securities Markets) Regulations, 2003, ..."

The learned senior counsel submitted that in para 16.104 it is recorded that:

> "Investigations are being completed and quasi judicial proceedings including issue of show cause notice, commencing inquiry proceedings and adjudication proceedings are being initiated. In the interim, pending completion of the quasi

> judicial proceedings, the following order is issued:”

He submitted that this shows that SEBI is alive to every aspect of the matter. It was alive to every provision of law and it was only after having felt that this is the only way as a last resort that the order impugned is passed.

The learned senior counsel submitted that the SEBI has taken care of giving hearing to the persons concerned, as mentioned in para 17.18 which may be reiterated even at the cost of repetition. Para 17.18 reads thus,

> “This order shall be treated as show cause notice against the concerned entities named herein. The entities/ persons against whom this order is issued may file their objections, if any, to this order within 15 days from the date of this order and if they so desire, avail themselves of an opportunity of personal hearing .. ..”

The learned senior counsel submitted that even in para 11 of the order links amongst the 'key operators' and 'financiers' are set out. He submitted that from subparas of para 11 it is clear that shares were transferred off-market between them prior to commencement of 'pay in/ pay out' on the stock exchanges. The learned counsel invited attention to para 11.5 which reveals the

mode and method of working of the petitioners. Para 11.5 reads as under:

> "M/s Welvet Financial Advisors Ltd. have approached us for lending us money in subscribing for IPO. They have lent me Rs.78 lakhs for the purpose of making margin for retail application to my group. After getting allotment of IDFC, we have transferred 43,000 equity shares of IDFC as per their instruction and balance amount of Rs.64 lakhs returned by cheque payment."

This is disclosed by one Shri Dharmesh Mehta in response to a query made about his relationship with M/s Welvet Financial Advisors Ltd. The learned senior counsel submitted that para 11.7 is material for understanding the entire design in which the persons like the petitioners acted. Para 11.7 reads thus:

> "In this context it is seen that in the month of June 2005, Welvet Financial had directly applied for 60,75,000 shares in the public issue of Yes Bank for Rs.27 crores and was alloted only 1,39,073 number of shares. It appears that Welvet Financial had applied in the non institutional (High Networth) category in the IPO of YES Bank and hence had failed to get allotment of large number of shares in the YES Bank IPO. In view of the above, apparently, Welvet Financial had approached Dharmesh Mehta and Roopalben Panchal for the purpose of making

> applications in the retail category in the IPO of IDFC since Dharmesh Mehta and Roopalben Panchal had large number of demat accounts under their control."

Para 11.8 reads as under:

> "Thus, there was apparently arrangement between Dharmesh Mehta and Welvet Financial for cornering the retail portion of the IDFC IPO and this arrangement was sought to be given the colour of loan transaction. Since Roopalben Panchal has also made off-market transfers to Welvet Financial as done by Dharmesh Metha, it appears that similar arrangements might have existed between Roopalben Panchal and Welvet Financial. Thus, Welvet Financial has acted as financier for both Roopalben Panchal and Dharmesh Mehta."

The learned senior counsel for respondents submitted that it is emphatically submitted that 'financing in itself is not prohibited by law', but then if that 'financing' is with a dubious purpose and more so when it is detrimental to the investors or securities market, it is the duty of the SEBI to rise to the occasion and pass such order/s as is required for protecting the interest of the investors.

42. The learned senior counsel for respondents replying to the submission of the learned senior counsel for the

petitioners that, 'SEBI has no power to investigate against the investors', submitted that firstly the petitioners are not the real investors as projected. He submitted that there is material on record, incorporated in the order itself which shows that the petitioners did not act as 'investors' but acted 'as a link' in the chain, to achieve the goal of earning undue profit by cornering the IPOs. The learned senior counsel for respondents submitted that besides, the petitioners will fall within the term, “any person associated with securities market”. He submitted that section 11C of the SEBI Act contemplates an investigation against any person who is associated with securities market. Clause (b) of subsection (4) of section 11 of the SEBI Act authorises SEBI to restrain persons from accessing the securities and prohibit any person associated with securities market to buy, sell or deal in securities. He submitted that he be permitted to reiterate that firstly the petitioners are not 'the investors' as projected and in the alternative they are definitely 'persons associated with securities market' and therefore, this submission fails.

The learned senior counsel for respondents submitted that in any case, whether the petitioners are investors or not, does not affect 'the jurisdiction' aspect one way or the other. He submitted that even if the petitioners are investors they do fall in the category of “any person

associated with the securities market", therefore, even in that capacity the order impugned could have been passed against the petitioners.

43. The learned senior counsel for respondents submitted that so far as the submission made by the learned counsel for the petitioners that, 'no reasons being found in the order impugned, for which a prohibition is imposed on the petitioners to deal with the securities even in the secondary market'. He submitted that the fact that the petitioners are found to be in a role 'manipulating the securities market', is sufficient for prohibiting them from buying and selling even from the secondary market. He submitted that in fact there is no hard and fast boundary line between the so called primary market and the secondary market. He submitted that in fact if the submission of the learned senior counsel for the petitioners is accepted then as it is on record the petitioners themselves have never applied to subscribe the IPOs. Therefore, they were never buyers in the primary market. It was only after allotment of shares to numerous fictitious and benami account-holders transferred the shares allotted in those accounts to 'key operators', who in turn transferred those shares to 'financiers'. Thus, it was nothing but a secondary market and that being so, restrictions imposed by the order on the petitioners from approaching the securities market,

is not in any way unreasonable. He submitted that in fact there is no distinct primary market and secondary market. It is the terminology which is coined by the people for their convenience. The law does not make any distinction between 'primary market' and 'secondary market'. He submitted that initially when shares are offered to the public, it is conveniently referred as 'primary market'. In the present case the petitioners have acquired shares from the persons who were allotted those shares and not directly by applying to the company for allotment in 'retail quota'. He submitted that this will definitely go to show the petitioners have been operating in secondary market and therefore, the order is just and proper even on this count.

44. The learned senior counsel for respondents submitted that para 16 of the order records the 'conclusions' and these conclusions are qualified by the word, 'prima facie'. He submitted that these conclusions are based on the material revealed in the investigation undertaken by the officer appointed by the Board. The very fact that it is clearly mentioned that they are 'prima facie' it cannot be said that the 'final conclusions' are drawn against the petitioners. He submitted that as submitted hereinabove the order is in the nature of 'Show Cause Notice' and the petitioners are called upon to avail an

opportunity of hearing. He submitted that para 16.1 in this regard is relevant, which reads as under:

> "At the outset, it is to be mentioned that the findings in this order against the several entities are based upon an incisive examination and analysis which has become prolix due to sheer number of details, dauntingly massive and intricate, collected from inspection reports, exchanges, depositories, banks, etc., to reconstruct the sequence of events in the entire gamut of IPO allotment from 2003 – 2005 in a real time setting, so as to appraise them in the realtime continuum for getting the necessary insights into what really transpired under the veneer of copious documentation and seeming compliance. The exercise involved wading through enormous mass of details, identifying suspect transactions and entities, linking them to fund flow with specific attribution to the real persons behind it, establishing linkages amongst them for possible collusion as well as control and a host of other related incidentals in a searing search that moves from one lead to another to grapple with the issues in all its ramifications, unravel the decussating strands for getting at the tell-tale. Given the magnitude of the exercise and the constraints attendant thereon, this order seeks to capture the quintessence of the same with reference to scattered findings in a welter of non-descriptness, besides building an internally consistent logic into them to impart

> perspicacity and clarity. In that view the prima facie conclusions which are only a summary of the details discussed in the various headings and sub-headings of the order need to be read with them, in so far as they are relevant and that alone would enable to size up the issue in all its enormity." (emphasis supplied)

45. The learned senior counsel for respondents submitted this very fact of the conclusions being 'prima facie' is also recorded in para 16.103, which reads as under:

> "The findings of investigations so far, prima facie, reveal violations of serious nature by the key operators, their financiers, concerned DPs .. .."

46. The learned senior counsel for respondents submitted that Regulation 3 of SEBI (Prohibition of Fraudulent and Unfair Trade Practices Relating to Securities Markets) Regulations, 2003, provides in Regulation 3 for prohibition of certain dealings in securities. He submitted that the Regulation provides for, "no person shall directly or indirectly .. ", meaning thereby it does not make difference as to whether that person is acting in what capacity. The learned senior counsel submitted that clause (b) prohibits every person from using or employing, in connection with the issue,

purchase or sale of any security listed or proposed to be listed in a recognised stock exchange, any manipulative or deceptive device or contrivance in contravention of the provisions of the Act or the rules or the regulations made thereunder.

He submitted that clause (b) of Regulation 3 is wide enough to cover the activities of the petitioners in its sweep.

The learned senior counsel for respondents submitted that if the transactions in question are looked into 'as a whole', it reveals that the petitioners did employ a manipulative mode with regard to the issue in question, they did purchase and then sell the shares, which was to be listed and was later on listed, to get the shares (IPOs) which otherwise they could not have got had they applied in their 'individual' capacity. Not only that they could not have got these number of shares even as an 'institution'. He submitted that the representation made before the Court that, 'the transaction be viewed in different segments as submitted by the learned counsels for the petitioners and if that is done then each segment, independent as a 'transaction' does not attract any of the prohibitions imposed by law, cannot be accepted. He submitted that as it is successfully made out it is one single transaction which has brought about

a 'net result' and that 'net result' is taken into consideration by the Board and then the order is passed. The learned senior counsel for respondents submitted that this fact is recorded in para 17.1 of the order, to recapitulate para 17.1. is reproduced:

> “In view of the grave emergency arising out of the conduct of parties with the added risk that such devious practices, if unchecked, would be continued with impunity in future, there is a need for immediate regulatory intervention. In the wake of the interim orders in the case of Yes bank and IDFC IPOs there has been a spate of public complaints alleging manipulation in IPO's and urging immediate action from SEBI for protecting the retail investors. Also there is a heightened investors' concern on the IPO's as reflected in the tenor of demands made on SEBI, and the same calls for a timely response from SEBI as regulator to restore the confidence of the retail investor. Amidst such public expectations, coupled with due regard to the fact that number of IPO's are in the wait for entry into the securities market, which need to be insulated from the manipulators of the various entities as mentioned in this order by suitably restraining them from participation in the ensuing IPO's which has acquired a sense of urgency and which cannot brook the normal delay of quasi judicial proceedings for taking a decision, there is an imperative need to pass the **present interim order** to protect the market particularly the IPO's from being preyed on by

> predatory manipulators. Further, if the entities, as prima facie found to be instrumental in tilting the IPO allotment process to their favour by the intricate modus operandi as clearly seen in the findings of this order, are allowed to operate in the market any more, the same is fraught with immense mischief and incalculable damage to IPO allotment process besides undermining the confidence of the retail investors who are urging for a flair deal in the market free of such manipulators. Also SEBI has to reckon with the present booming market while formulating a course of action as decided in this order. Therefore, with a view to protect the interest of investors and securities market from further such acts, in exercise of the powers delegated to me by the SEBI Board in terms of section 19 of the Securities and Exchange Board of India Act, 1992 read with Section 11, 11B and 11(4)(b) thereof and section 19 of Depositories Act, 1996, pending inquiry and passing of final order, I hereby issue the following directions, **by way of ad interim, ex parte order**: (emphasis supplied)

47. The learned senior counsel for respondent in support of his submissions relied upon a decision of the Bombay High Court in the matter of **Anand Rathi and others Vs. Securities and Exchange Board of India**, reported in 2002 (1) Maharashtra Law Journal 522. He submitted that

there the Court was pleased to hold that, 'even pending investigation' into the allegations of misuse of official position by a broker, an ex President of SEBI by manipulating the inside trade, SEBI has power under sections 11, 11B, to order his suspension as an interim measure. He submitted that he may be permitted to reiterate even at the cost of repetition that the term 'investigation' has to be construed in a manner as suggested by him and not as canvassed by the learned senior counsels for the petitioners. He submitted that an investigation can as well be in to a '**transaction**' and not necessarily against a particular **person** and when in the course of investigation which is in to a transaction 'material' is found, then even as 'interim measures', an order can be passed, as is passed in the present case.

48. The learned senior counsel for respondents relied upon para 15 of the judgement. The same is quoted for ready perusal:

> "15. The main issue raised in this petition is concerning the limits of powers of the SEBI Board which regulates capital market of the country. The capital market has acquired a status of the system as a part and parcel of the national economy where companies seek to raise funds for different types of transactions in the

course of their business and individuals invest their savings. Previously, there was Securities Contracts (Regulation) Act, 1956 to prevent undesirable transactions in securities by regulating business or dealings therein and providing for certain other matters connected therewith. This Act provided for recognised stock exchanges and the control of the Central Government on such recognised stock exchanges. With the passage of time the Government felt more concerned with health growth of the securities market and taking into consideration the relevant factors influencing the growth of the capital market it realised the necessity to pass a comprehensive legislation for setting up a statutory apex board to promote orderly and healthy growth of the securities market. SEBI was constituted vide Resolution dated 12.4.1988 of the Ministry of Finance, Department of Economic Affairs (Investment Division). On 30.1.1992 the Securities and Exchange Board of India Ordinance 1992 was promulgated by the President and ultimately the Securities and Exchange Board of India Act, 1992 was enacted and notified on 12.4.1992. It was deemed to have come into force on 30.1.1992 in terms of section 1(3) of the said Act. The Statement of Objects and Reasons appended to the Bill when the enactment was made stated that “The capital market has witnessed tremendous growth in recent times, characterised particularly by the increasing participation of the public. Investor confidence in the capital market can be sustained largely by investors protection. With this end in view, the Government decided to vest

> SEBI immediately with statutory powers required to deal effectively with all matters relating to capital market .. “

The learned senior counsel for respondents submitted that the Court had an occasion to consider the limits of power of SEBI, which is assigned duty, 'to regulate capital market of the country', and the Court was pleased to hold that, 'the SEBI does have power to pass order as is passed in the present case'. The learned senior counsel submitted that this is to be noticed from paras 17, 18, 19 and 20 of the said judgement. He invited pointed attention of the Court to these paragraphs. The same are as under:

> “17. The plain reading of section 11 itself shows that SEBI has to protect interests of the investors in securities and to regulate the securities market by such measures provided in subsection (2) of section 11 and in due discharge of its duty cast upon SEBI as part of its statutory functions, it has been invested with the powers to issue directions under section 11B. ..”

He submitted that the Court has also held that,

> “18. While considering the question as to whether the SEBI has authority of law under sections 11 and 11B to order interim suspension,

> we have to bear in mind that SEBI is invested with statutory powers to regulate securities market with the object of ensuing investors protecting, orderly and healthy growth of securities market so as to make SEBI's control, over the capital market to be effective and meaningful. .. .." (emphasis supplied)

49. The learned senior counsel for respondents submitted that in para 21 the Court is pleased to order as under:

> "21. In the light of the above decisions and also in the light of the fact that the SEBI as regulator of securities market is empowered to take all necessary measures to protect the interest of the investors and the capital market, we have no hesitation in holding that the SEBI is fully competent and is empowered by sections 11 and 11B to pass interim order in aid of the final orders. .. .." (emphasis supplied)

The learned senior counsel for respondent also relied upon paras 22, 27, 28, 31 and 32 of the judgement.

50. The learned senior counsel next relied upon a decision of Delhi High Court in the matter of M.Z. Khan Vs. Securities and Exchange Board of India and others, reported in A.I.R. 1999 Delhi 164. The learned senior counsel submitted that Delhi High Court was pleased to hold that, 'the Board has powers to pass interim orders

to effectuate purpose of Act and Regulations'. He submitted that the Court was also pleased to hold that, 'the discretion of the Board cannot be interfered with by the Court sitting in writ jurisdiction even when serious questions were involved'. (emphasis supplied) The learned advocate relied upon paras 17 and 18 of the judgement. The learned counsel submitted that the Court has, in no uncertain terms held that,

> “18. .. .. Though the SEBI is possessed of the power to pass an interim order, in the instant case it did not exercise that power on the ground that it was in the interest of the shareholders to allow them to receive the value of their shares at the rate of Rs.100/- per share which is the same rate at which the shares of SVCL held by the financial institutions were purchased by the nine companies. It cannot be said that the reason for not suspending the process set in motion by the public announcement was not adequate or was arbitrary or the reason suffered from illegality or irrationality. The grant of interim order was in the discretion of the SEBI. Such discretion cannot be interfered with even when serious and substantial questions have been raised by the petitioner and the third respondent. Those questions are for the SEBI to determine. I have no doubt that the SEBI will bestow its consideration on the issues which arise in the case. The determination of these questions will not be made by this Court sitting in writ jurisdiction when such determination

> lies in the domain of the authorities mentioned in the Regulations. Not only the authorities have to consider the questions raised by the petitioner and the third respondent, they have also to consider the defence which may be raised by respondents no.4 to 13 in regard to the allegation of violation of Takeover Regulations including the ones which were indicated by Mr.Desai, while making his submissions on behalf of respondents no.4 to 12, .. "

The learned senior counsel for respondent submitted that in the present case also by the order under challenge, which, as submitted earlier and is reiterated, that it is in the nature of 'Show Cause Notice', the petitioners are invited to file their objections and get the matter heard.

51. The learned senior counsel for respondent next relied upon a decision of this Court in the matter of **M/s Karnavati Fincap Ltd. & another Vs. Securities & Exchange Board of India**, reported in 1996 (2) GLH 241. He submitted that this Court has held that, 'the Board (SEBI) has power and duty to take all measures to effectively tackle the malpractices connected with the securities trading'. He submitted that the Court had considered the term, "persons associated with the securities market" and held that, 'the buyers and sellers of securities are such persons'. (emphasis

supplied) The learned senior counsel relied upon paras 4, 6 and 21 of the judgement. He submitted that para 4 is relevant for our purpose. Para 4 reads as under:

> "For examining the rival contentions, it would be appropriate to refer to the relevant provisions of sections 11, 11B and section 12. Section 11(1) imposes paramount duty on the Board to protect the interests of investors in securities and to promote the development of, and to regulate the securities market, and for achieving this object, it gives out plenary powers to have resort to such measures as it thinks fit. Section 11(1) not only prescribes duties but confers powers as well, to effectively discharge those duties. Viewed in this way, subsection (2) which commences with words without prejudice to the generality of the foregoing provisions, "proceed to enumerate matters for which the Board may provide such provision is to be read as illustrative and not exhaustive of the matters of the measures which can be provided for by the Board in furtherance of discharge of its duties referred to in subsection (1)." (emphasis supplied)

The learned senior counsel next relied upon a judgement of the Hon'ble the Apex Court in the matter of **Sumati Dayal Vs. Commissioner of Income Tax, Bangalore**, reported in 1995 Suppl. (2) SCC 453. He submitted that the Hon'ble the Apex Court was pleased to hold that,

> "**Authorities are entitled to** look into the surrounding circumstances to find out the reality **and the matter has to be considered by applying the test of human probabilities.**" (emphasis supplied)

He submitted that it will be appropriate to draw the attention of the Court to the facts which were before the Hon'ble the Apex Court, which are set out in para 8, which reads as under:

> "During the year 1970-71 (pertaining to assessment year 1971-72) between 6-4-1970 to 20-3-1971, the appellant claims to have won in horse races a total amount of Rs.3,11,831 on 13 occasions out of which 10 winnings were from Jackpots and 3 were from Treble events. Similarly, in the year 1971-72 the appellant won races on 2 occasions and both the times winnings were from Jackpot. In her sworn statement dated 6-1-1973, the appellant had stated that she started going for races from the end of 1969 and that she first won Jackpot on 12-12-1969 on the first day she went to races. The appellant also stated that she worked out the combination on the basis of what her husband advised her but she used to add a few horses of her own although she admitted that she did not know anything about the performance of these horses before December 1969. As regards her husband, the appellant stated that he won once in Calcutta and once in Madras and he had similar wins also. The appellant had also stated that she had not

> gone to races in 1972. The appellant admitted that she had been buying Jackpot tickets of the value of RS.2000, Rs.1400 and even tickets for Rs.3000 have been bought and that on the first day she won the Jackpot she purchased a Jackpot combination ticket for approximately Rs.2500 and that on 8-11-1970 she had bought two combinations, each for about Rs.2000. The appellant also admitted that she had not claimed any loss in races and only winnings were shown and stated that she won similar amounts which were not accounted and the losses were met out of the said amounts. The appellant further stated that she had no record of her expenditure at the racecourse as against her claim of winnings."

He submitted that paras 9, 10 and 12 are also relevant and material, which read as under:

> "9. Having regard to the said statement of the appellant, the two members, constituting the majority on the Settlement Commission, <u>came to the conclusion that the apparent is not the real</u> and that the appellant's claim about her winning in races is contrived and not genuine for the following reasons:
>
> (i)The appellant's knowledge of racing is very meagre.
>
> (ii)A Jockpot is a stake of five events in a single day and one can believe a regular and experienced punter clearing a Jackpot occasionally but the claim of the appellant to have won a number of Jackpots in three

or four seasons not merely at one place but at three different centres, namely, Madras, Bangalore and Hyderabad appears, prima facie, to be wild and contrary to the statistical theories and experience of the frequencies and probabilities.

(iii) The appellant's books do not show any drawings on race days or on the immediately preceding days for the purchasee of Jackpot combination tickets, which entailed sizable sizable amounts varying generally between Rs.2000 and Rs.3000. The drawing recorded in the books cannot be correlated to the various racing events at which the appellant made the alleged winnings.

(iv)While the appellant's capital account was credited with the gross amounts of race winnings, there were no debits either for expenses and purchase of tickets or for losses.

(v) In view of the exceptional luck claimed to have been enjoyed by the appellant, hr loss of interest in races from 1972 assumes significance. Winnings in racing became liable to income tax from 1-4-1972 but one would not give up an activity yielding or likely to yield a large income merely because the income would suffer tax. The position would be different, however, if the claim of winnings in races was false and what were passed off as such winning really represented the appellant's taxable income from some undisclosed sources. (emphasis supplied)

10. The majority opinion concludes that it would not be unreasonable to infer that the appellant had not really participated in any of the races except to the extent of purchasing the winning tickets after the events presumably with unaccounted funds.

12. This, in our opinion, is a superficial approach to the problem. The matter has to be considered in the light of human probabilities. The Chairman of the Settlement Commission has emphasised that the appellant did possess the winning ticket which was surrendered to the Race Club and in return a crossed cheque was obtained. It is, in our view, a neutral circumstance, because if the appellant had purchased the winning ticket after the event she would be having the winning ticket with hr which she could surrender to the Race Club. The observation by the Chairman of the Settlement Commencing that “fraudulent sale of winning ticket is not an usual practice but is very much of an usual practice” ignores the prevalent malpractice that was noticed by the Direct Taxes inquiry Committee and the recommendations made by the said Committee which led to the amendment of the Act by the Finance Act of 1972 whereby the exemption from tax that was available in respect of winnings from lotteries, crossword puzzles, races, etc. was withdrawn. Similarly the observation by the Chairman that if it is alleged that these tickets were obtained through fraudulent means, it is upon the alleger to prove that it is so,

> ignores the reality. The transaction about purchase of winning ticket takes place in secret and direct evidence about such purchase would be rarely available. An inference about such a purchase has to be drawn on the basis of the circumstances available on the record. Having regard to the conduct of the appellant as disclosed in her sworn statement as well as other material on the record an inference could reasonably be drawn that the winning tickets were purchased by the appellant after the event. We are, therefore, unable to agree with the view of the Chairman in his dissenting opinion. In our opinion, the majority opinion after considering surrounding circumstances and applying the test of human probabilities has rightly concluded that the appellant's claim about the amount being her winnings from races is not genuine. It cannot be said that the explanation offered by the appellant in respect of the said amounts has been rejected unreasonably and that the finding that the said amounts are income of the appellant from other sources is not based on evidence." (emphasis supplied)

The learned senior counsel for respondent submitted that in the present case also if totality of the circumstances is taken into consideration it is very clear that 'afferent accounts' in thousands were got opened by fictitious and benami entities and through these accounts 'IPOs' were applied. Soon after the allotment, the shares allotted to these accounts were transferred to

'key operators'. The 'key operators' in turn transferred these shares to its 'financier'. Who in turn on the day of listing or soon thereafter disposed of those shares in the market. He submitted that there is evidence to the effect that these 'financiers', financed 'key operators' and the 'key operators' were in control of those fictitious and benami accounts, thousands in number. There is evidence to the effect that from more than 500 'afferent accounts' shares have been transferred to one single account and from that account shares are transferred to the account of the petitioners. This chain of various segments of a transaction is to be taken as a one single transaction and not as suggested by the learned senior counsels, for the petitioners. The learned senior counsel for respondents submitted that as held by the Hon'ble the Apex Court in the aforesaid decision, what is required to be taken into consideration is, 'the **totality**' of the circumstances including that of surrounding circumstances'. He submitted that in the case on hand, there is abundant material which reveals that the transaction as aforesaid has taken place and that the benefit is pocketed by the persons like the petitioners. Besides, they do not deny of having 'financed' to the persons, whose names are mentioned in the order, in that case merely on the ground that, 'there was no inquiry against the petitioners as an individual', not to pass any order against the

petitioners or to interfere with the order already passed, will be nothing but 'closing eyes' to hard reality of life. He submitted that though it is already submitted, but still reiterated that, “none of the petitioners could have got so many shares alloted had they applied in 'retail segment' as genuine investors”. If they had applied in the 'institutional segment', they would have been required to apply in a much 'larger volume'. The fact remains that such a large number of shares they could not have got by way of allotment as an individual unless resorted to manipulative practice.

52. The learned senior counsel for respondents relied upon a decision of the Hon'ble the Apex Court in the matter of Maharashtra State Board of Secondary and Higher Secondary Education Vs. K.S. Gandhi and others, reported in (1991) 2 SCC 716. He submitted that in this case the Hon'ble the Apex Court was considering, 'the case of an examination, held by the appellant-Board. In that 'examination' after the answer sheets were assessed by the examiners, the random checking was done by the moderators and thereafter further recounting was done at the Board, finally the mark sheets were sent to Pune for feeding into the computer and then to declare the results. It was found that moderators' mark sheets related to 283 examinees, which included 53 respondents, were tampered with. In many cases in more than 2 to 8

subjects, while in few cases in only one subject. As a result of this tampering,214 examinees who were otherwise to fail passed, whereas remaining 69 examinees improved their ranking, which in some cases 'exceptionally good'. The declaration of their results was withheld, pending 'further inquiry'. The rest of the result was declared on June 30, 1990. The Board appointed seven inquiry officers. Show cause notices were issued to the students on July 30, 1990 informing them of the nature of tampering, the subjects in which the marks were found tempered with, the marks initially obtained and the marks increased after tampering. The Show Cause Notice also indicated 'the proposed punishment', if in the inquiry it would be found that marks were tampered with the knowledge or connivance or at the instance of the candidates or parents or guardians. The students were also informed that they would be at liberty to inspect the documents at the office of the Board at Bombay. They were entitled to adduce documentary and oral evidence at the hearing and to cross-examine the witnesses of the Board. However, they were not permitted to appear through an advocate, but the parents or guardians were permitted to only accompany the students at the time of inquiry, without taking part in the inquiry. The candidates submitted their explanations denying the tampering and appeared before the inquiry Officers. At the inquiry, each

student inspected the record. A questionnaire was given to be filled in writing. Every candidate was shown his answer book, marks awarded in the subject/ subjects and the tampered marks in the moderators' marks sheets. The students were asked to testify, 'whether the answer books belonged to him or her' and 'to identify the marks awarded by the examiner to each answer to the question and the total marks awarded'. They were also asked, 'to verify and state whether the moderator's marks sheets were tampered with in the concerned subject or subjects as the case may be'. The student could easily identify and in fact identified his or her answer books and verified the marks awarded and answered positively that the marks were fabricated in the moderators' mark sheets. The questionnaire was also given to indicate their educational background in the previous school years and also the marks they expected at the final examinations. Further question in the proforma was, 'to ascertain from the students, due to tampering, whether or not the marks were increased to his or her advantage'. All the candidates admitted that the marks initially awarded by the examiner were tampered in the moderator's mark sheets; due to tampering the marks were increased and the increase was to their advantage. However, they denied that either they or their parents or guardians were 'privy to the tampering'. The inquiry Officers submitted their reports to the Board holding that, 'the

moderators' mark sheets had been fabricated'. The 'Standing Committee' constituted in this regard, on consideration of the records and the reports resolved to withhold, as a measure of punishment, the declaration of the results of their examinations and to debar the 283 students to appear in the supplementary examination to be held in October 1990 as well as March 1991 examination. A notification was published accordingly.

The students approached the High Court by filing writ petition which was allowed. The Board approached the Hon'ble The Supreme Court by filing appeal, which was allowed. In doing so, the Hon'ble the Apex Court was pleased to hold that,

> “(i) denial of lawyer's assistance to minors is not violative of the principles of natural justice,
>
> (ii) the absence of opportunity to the parents or guardians does not vitiate the legality or validity of the inquiry conducted or decision of the committee,
>
> (iii)the inquiry report containing only conclusions of fabrication of moderator's mark sheets without any reasons in support, is not illegal and violative of principles of natural justice,
>
> (iv) where facts are not in dispute, non

recording of reasons in support of the conclusions arrived at in the report is not violative of principles of natural justice,

(v) strict rules of the Evidence Act and standard of proof envisaged therein do not apply to departmental proceedings or domestic tribunal. It is open to the authorities to receive and place on record all the necessary, relevant, cogent and acceptable material facts though not proved strictly in conformity with the Evidence Act. The material must be germane and relevant to the facts in issue. In grave cases like forgery, fraud, conspiracy, misappropriation, etc. seldom direct evidence would be available. Only circumstantial evidence would furnish the proof. Inference from the evidence and circumstances must be carefully distinguished from the conjectures and/ or speculation.

(vi) the standard of proof is not proof beyond reasonable doubt but the preponderance of probabilities tending to draw an inference that the fact must be more probable. Standard of proof however, cannot be put in a strait- jacket formula. Probative value could be gauged from the facts and circumstances of a given case."

The learned senior counsel for respondents invited attention of the Court to further following observations of the Hon'ble the Apex Court,

"Unless either the examinee or parent or

> guardian approached the fabricator; gave the number and instructed him/ them to fabricate the marks, it would not be possible to know their number to fabricate. The act of fabrication is an offence. Merely that it was done in one subject or more than one makes little difference. Its gravity is not mitigated if it is committed in one subject alone. This is not an innocent act or a casual mistake during the course of performance of the official duty. It was obviously done as a concerted action. In view of the admitted facts and above circumstances the necessary conclusion that could unerringly be drawn would be that either the examinee or the parent or guardian obviously was a privy to the fabrication and that the forgery was committed at his or her or parent's or guardian's behest. It is, therefore, clear that the conclusion reached by the Standing Committee that the fabrication was done at the instance of either the examinees or their parents or guardians is amply borne out from the record."

The learned senior counsel invited attention of the Court also to para 11 of the judgement and submitted that the Hon'ble the Apex Court was pleased to hold that:

> ".. .. This is based on record. It is not open to the High Court to evaluate the evidence to come to its own conclusions. Thereby the High Court has committed manifest error of law warranting interference by this Court."

The learned senior counsel submitted that the submission of the learned counsels for the petitioners that, 'there is absence of reasons in the order' stands answered by para 22 of this judgement. He relied upon para 22, which reads as under:

> “From this perspective, the question is whether omission to record reasons vitiates the impugned order or is in violation of the principles of natural justice. The omnipresence and omniscience (sic.) of the principle of natural justice acts as deterrence to arrive at arbitrary decision in flagrant infraction of fair play. But the applicability of the principles of natural justice is not a rule of thumb or a strait-jacket formula as an abstract proposition of law. It depends on the facts of the case, nature of the inquiry and the effect of the order/ decision on the rights of the person and attendant circumstances. .. ..”

The learned senior counsel for respondent submitted that the Hon'ble the Apex Court was pleased to focus its attention to the 'controversy' and formulated the questions, recorded in para 25, which read as under:

> “The crucial question, therefore, is whether the conclusions reached by the authorities that the examinees, their parents or guardians were parties to the fabrication and whether their complicity was established from the record and whether the evidence was sufficient to support

such conclusion reached by the Standing Committee or the Enquiry Officer." (emphasis supplied)

The learned senior counsel for respondent submitted that this question is answered in the next para, i.e. para 26 and others. He submitted that the observations of the Hon'ble the Apex Court in the case of Bihar School Examination Board Vs. Subhas /Chandra Sinha, wherein the Hon'ble the Apex Court was pleased to quote para 14 of its earlier judgement of which a part is relevant for our purpose, which reads as under:

" .. ..

.. ..

The University or the Board cannot hold a detailed quasi judicial inquiry with a right to its alumni to plead and lead evidence etc. before the results are withheld or examinations cancelled. If there is sufficient material on which it could be demonstrated that the Authority was right in its conclusion that the examination ought to be cancelled then academic standards require that the Authority's appreciation of the problem must be respected. It would not be for the courts to say that we should have examined all the candidates or even their representatives with a view to ascertaining whether they had received assistance or not. To do this, would encourage indiscipline, if not also perjury."

The learned senior counsel for respondent submitted that the Hon'ble the Apex Court has reiterated that,

> “.. .. The Examination Committee relies upon such evidence to come to the conclusion that the examinee has used unfair means in answering questions then it is not open to the High Court to interfere with that decision, merely because the High Court may take a different view on reassessment of those circumstances. While it is open to the High Court to interfere with the order of the quasi judicial authority, if it is not supported by any evidence or if the order is passed in contravention of the statutory provisions of the law or in violation of the principles of natural justice, the Court has no jurisdiction to quash the order merely on the ground that the evidence available on record is insufficient or inadequate or on the ground that different view could possibly be taken on the evidence available on record. .. ..”
> (emphasis supplied)

The learned senior counsel for respondent replying to the submissions made by the learned senior counsel, Mr.Nanavati, that the order is under section 11B of the SEBI Act and that can be passed only after according an opportunity of hearing, submitted that the order is as well under section 11(4) of the SEBI Act. He submitted that in view of the submission already made hereinabove, the issue shall not detain the Court as it is mentioned in para 17.1 of the order as under:

> “.. .. Therefore, with a view to protect the interest of investors and securities market from further such acts, in exercise of the powers delegated to me by the SEBI Board in terms of section 19 of the Securities and Exchange Board of India Act, 1992 read with Section 11, 11B and 11(4)(b) thereof and section 19 of Depositories Act, 1996, pending inquiry and passing of final order, I hereby issue the following directions, by way of ad interim, ex parte order.”

The learned senior counsel for the respondent while answering the contentions that the 'order is disproportionate', placed reliance on a decision of the Hon'ble the Apex Court in the matter of NCT of Delhi and another Vs. Sanjeev Alias Bittoo, reported in (2005) 5 SCC 181. He submitted that it is held by the Hon'ble the Apex Court that 'the question of existence of the material and not sufficiency of the material' can be gone into by the Court and while examining an administrative action what is required to be seen by the Court is, 'as to whether there is manifest error in exercise of power by which action is rendered to be manifestly arbitrary'. He submitted that, 'it is well settled that the authority, in which discretion is vested can be asked to 'exercise that discretion', but cannot be asked to exercise that discretion in any particular manner'. He submitted that it is also well

settled that, 'discretion must be exercised only by the authority in which it is vested and not by any other body. He submitted that this is laid down by various decisions.

> “.. .. In general, discretion must be exercised only by the authority to which it is committed. That authority must genuinely address itself to the matter before it; it must not act under the dictates of another body or disable itself from exercising discretion in each individual case. In the purported exercise of its discretion, it must not do what it has been forbidden to do, nor must it do what it has not been authorised to do. It must act in good faith, must have regard to all relevant considerations and must not be influenced by irrelevant considerations, must not seek to promote purposes alien to the letter or to the spirit of the legislation that gives it power to act, and must not act arbitrarily or capriciously. .. .. “

He submitted that in the present case the order, under challenge does answer all these tests, and therefore, the Court should uphold the same.

The learned senior counsel for respondent submitted that the Hon'ble the Apex Court has quoted the observations of Lord Greene in the matter of **Associated Provincial Picture Houses Ltd. Vs. Wednesbury Corpn**. reported in All ER 682, (in para 19). He submitted that those

observations are aptly applicable to the facts of the present case. The observations read as under:

> Lord Greene observed (KB p. 230 : All ER p.683 F-G).
>
> ".. .. it must be proved to be unreasonable in the sense that the court considers it to be a decision that no reasonable body can come to. It is not what the court considers unreasonable. ... The effect of the legislation is not to set up the court as an arbiter of the correctness of one view over another."
>
> Therefore, to arrive at a decision on "reasonableness" the court has to find out if the administrator has left out relevant factors or taken into account irrelevant factors. The decision of the administrator must have been within the four corners of the law, and not one which no sensible person could have reasonably arrived at, having regard to the above principles, and must have been a bona fide one. The decision could be one of many choices open to the authority but it was for that authority to decide upon the choice and not for the court to substitute its view."

The learned senior counsel for respondent also invited attention of the Court to 'irrationality' explained by Lord Diplock, quoted from para 20 of the judgement. Lord Diplock explained "irrationality" as follows (All ER p.951 a-b) :

> “By 'irrationality' I mean what can by now be succinctly referred to as 'Wednesbury unreasonableness'. It applies to a decision which is so outrageous in its defiance of logic or of accepted moral standards that no sensible person who had applied his mind to the question to be decided could have arrived at it.”

The learned senior counsel invited attention of the Court to para 21 of the judgement which reads as under:

> “In other words, to characterise a decision of the administrator as “irrational” the court has to hold, on material, that it is a decision “so outrageous” as to be in total defiance of logic or moral standards. Adoption of “proportionality” into administrative law was left for the future.”

The learned senior counsel for respondent submitted that therefore, the submission of the learned senior counsel for petitioners that, 'the order is disproportionate' is not well founded. He submitted that, 'the principle of proportionality' is not applicable in the field of administrative law and therefore, those arguments be rejected by this Court.

53. The learned senior counsel for respondent next relied upon a judgement of the Hon'ble the Apex Court in

the matter of **Ajit Kumar Nag Vs. General Manager (PJ), Indian Oil Corporation Ltd., Haldia and others**, reported in (2005) 7 SCC 764. He submitted that in this judgement the Hon'ble the Apex Court has referred to its earlier decision in the case of **Satyavir Sing Vs. Union of India,** in para 50. He submitted that the Hon'ble the Apex Court has quoted the following para in para 50:

> ".. taking appropriate action in exceptional circumstances is a matter of assessment to be made by the disciplinary authority and must be judged in the light of the circumstances then prevailing. Normally, it is the officer on the spot who is the best judge of the situation and his decision should not be interfered with lightly. .. .."

The learned senior counsel next submitted that this group of petitions is not worth entertaining in extraordinary jurisdiction under Article 226 of the Constitution of India. He submitted that the petitions involve questions of disputed facts and therefore, the petitioners should be relegated to the alternative remedy. In support of this submission, he relied upon a decision of the Hon'ble the Apex Court in the matter **of U.P. State Bridge Corporation Ltd. and others Vs. U.P. Rajya Setu Nigam S. Karamchari Sangh**, reported in (2004) 4 SCC 268. The learned advocate relied upon the observations

of the Hon'ble the Apex Court in para 14, the relevant part of which reads that,

> “Finally it is an established practice that the Court exercising extraordinary jurisdiction under Article 226 should have refused to do so where there are disputed questions of fact. .. ..”

54. In rejoinder, answering to the submissions made by the learned senior counsel for the respondents, the learned senior counsel Mr.K.B. Trivedi submitted that 'basic questions' raised by the petitioners in all these petitions are not answered by the learned senior counsel for the respondents. He submitted that, 'the SEBI, which has power to pass order has passed the same without complying with the conditions precedent for passing such order. Mr.Trivedi reiterated that there is no investigation or inquiry pending **against the petitioners** and if that is so, the order could not have been passed against the petitioners. The learned senior counsel, Mr.Trivedi submitted that the order appointing inquiry officer dated 20th January 2006 does not refer to any of the petitioner or petitioners, similarly the order dated 20th January 2006 also, nowhere refers to any of the petitioners. He submitted that the opening part of the

order reads as under:

> “The Securities and Exchange Board of India (the Board) is satisfied that in the interest of investors and public interest to investigate into the affairs relating to buying, selling or dealing in the shares of Initial Public Offerings (IPOs) came during the period 2003-2005, more particularly to ascertain whether any provision of the SEBI Act, 1992, the Depositories Act, 1996 and the following Rules, Regulations and Guidelines made thereunder have been violated:”

The learned senior counsel, Mr.Trivedi submitted that the order dated 20th January 2006 in the latter part, refers only to the investigation into the affairs relating to buying, selling or dealing in the shares of Initial Public Offerings (IPOs) came during the period 2003-2005. He submitted that the order in specific empowers the officer appointed as 'Investigating Officer' to use powers under section 11(3) and 11(C) of the SEBI Act, 1992 for carrying out the 'investigation', therefore, order dated 20th January 2006 could not have been passed against any of the petitioners either in their individual capacity or collectively.

The learned senior counsel, Mr.Trivedi submitted that

inquiry under Chapter IV-A of the SEBI Act and under Regulations 8 and 9 of the SEBI (Prohibition of Fraudulent and Unfair Trade Practices Relating to Securities Markets) Regulations, 2003, is also not conducted. The learned senior counsel, Mr.Trivedi reiterated that the petitioners are ready to undertake to this Court that the petitioners will not be participating in the ensuing IPOs and will not be dealing with their holdings of the IPOs between 2003-2005 which are referred to in the order under challenge.

The learned senior counsel Mr.K.S. Nanavati also submitted that in fact the restriction imposed by the order under challenge is on the fundamental rights of the petitioners, and in light of the undertaking which the petitioners are ready to file it becomes totally unwarranted.

55. The question remains for consideration of this Court is 'whether the respondent-SEBI could have passed the order under challenge dated 27th April 2006' directing various parties mentioned in para 17.2, 24 in number in which at serial no.12-Kamal P. Jhaveri, petitioner in Special Civil Application No.10756 of 2006 figures, whereas in para 17.4, as many as, 85 persons/ entities, in which the rest of the petitioners are included, not to buy, sell or deal in securities market and also future

IPOs, directly or indirectly, till further directions.

56. The order issues certain directions against the DPs, as many as 12 DPs mentioned in para 17.9 are directed 'not to open fresh Demat Accounts till further directions'. NSDL, by para 17.12 is directed 'to conduct' an inspection and verify whether 'Demat Account-holders' of 15 DPs enlisted in para 17.11 are genuine and submit report within the period of one month from the date of the order. NSDL is also asked to report whether 'Know Your Client (KYC) norm is duly complied with or not and to take appropriate actions against suspected account-holders on verification. Vide para 17.13 directions against the 'depositories' are also issued.

57. This Court after considering the rival contentions/ submissions, provisions of law and the decisions of the Hon'ble the Apex Court is of the opinion that, 'the Statute by which the Board (SEBI) has come into existence, i.e. Securities and Exchange Board of India Act, 1992 is enacted with a definite purpose, and the purpose is to 'protect interest of investors' in securities and 'to promote the development of, and to regulate, the securities market and the matters connected therewith or incidental thereto'.

This Court is convinced that the Act confers powers on the Board to carry out the functions prescribed in Chapter IV. Section 11 in particular enumerates the functions of the Board. Not to lose sight of any word let it be repeated and reiterated by reproducing the same:

> " .. it shall be the duty of the Board to protect the interests of investors in securities and to promote the development of, and to regulate the securities market, by such measures as it thinks fit."

Similarly, subsection (4) of section 11 of the SEBI Act provides that, 'the Board can take any of the measures prescribed therein which include suspending of trading in security in a recognised stock exchange' and it also includes 'restraining of persons from accessing the securities market and prohibit any person associated with securities market to buy, sell or deal in securities'.

58. The controversy raised in these petitions is about the meaning to be given to the phrase used in subsection (4) of section 11 of the SEBI Act, which provides for the Board to take measures, prescribed in clause (a), (b), (c), (d), (e) and (f), "pending investigation or inquiry" or on completion of such investigation or inquiry.

The learned senior counsels for the petitioners in all these petitions, with all vehemence tried to convince this Court that, 'the phrase, "**either** pending investigation or inquiry" is to be construed so as to mean that such investigation or inquiry is pending **against** a person and only that person can be subject to the measures which are contemplated in the aforesaid clauses'. To put differently, the submission of the learned counsels for the petitioners is that, 'if there is no investigation or inquiry pending', the say of the learned senior counsels for the petitioners is that, 'in fact no investigation or inquiry had ever commenced against the petitioners' 'the SEBI cannot resort to any of the measures'. And in this particular case, the measure/s prescribed in clause (b) of subsection (4) of section 11 of the SEBI Act cannot be resorted to.

59. This Court after considering the rival submissions of the parties and various decisions cited during the course of arguments, is of the opinion that, 'if the interpretation as suggested by the petitioners is accepted, the SEBI will be denuded of the majority of its powers. Therefore, the meaning/ interpretation suggested by the learned senior counsels for the petitioners cannot be given to the phrase, "either pending investigation or inquiry". Order is passed by SEBI dated 20th January 2006 appointing 'Inquiry Officer'.

Once there is an investigation, which may not be 'against an individual' but if from the outcome of that investigation the SEBI comes to know that there is sufficient material which in its opinion is good enough to resort to the measures contemplated in clauses (a) to (e) of subsection (4) of section 11 of the SEBI Act, it can do so against such person. Therefore, order dated 20th January 2006, in its opening para mentions as under:

> "The Securities and Exchange Board of India (the Board) is satisfied that in the interest of investors and public interest to investigate into the affairs relating to buying, selling or dealing in the shares of Initial Public Offerings (IPOs) came during the period 2003-2005, .. " (emphasis supplied)

This shows that it is 'the transaction' which is under investigation.

The scheme of the Act is very clear. It is not against the 'person' only that an investigation or inquiry can be undertaken. The SEBI can inquire and investigate into a 'transaction' In the present case also it was on the basis of huge uproar with regard to IPOs which were issued during 2003-2005 that the SEBI was required to undertake the whole exercise. It is in this regard that order dated 20th January 2006 was issued appointing an

inquiry officer. It is this inquiry officer who submitted his report with an in-depth study, which is also reflected from the volume of the order which runs into only 252 pages. From the report the SEBI came to know about the 'manipulations' which warranted the order to be passed against the entities mentioned in para 17 (the operative part of the order).

60. At this juncture, it will be appropriate to mention that the learned senior counsels for the petitioners, could not dispute that 'the SEBI has power to dispense with pre-decisional hearing'. That being so, resorting to provisions, particularly, the measures prescribed in clause (b), subsection (4) of section 11 of the SEBI Act cannot be found fault with. The SEBI has power to investigate into the 'transactions'. On an investigation, SEBI came into possession of the material which warrants issuance of directions contained in para 17 of the impugned order. Therefore, issuance of order also cannot be found fault with.

61. The other important aspect which requires to be considered is, 'whether the SEBI should have responded in a positive manner to the offer made by the learned counsels for the petitioners that the petitioners are ready to undertake to this Court that they will not be participating in the ensuing IPOs and that they will not

be dealing with 105 securities, related to the IPOs which were issued between 2003 and 2005'.

The learned senior counsel for the SEBI has already pointed out that the 'entities' against whom the impugned order is passed are not the 'entities' who in their individual capacity as 'genuine' and 'bona fide' investors participated in the IPOs. He could successfully demonstrate before this Court that when 'the transaction as a whole' is looked into, it clearly shows that there was a game plan. Opening of Demat Accounts, running into thousands in the name of fictitious entities, subscribing IPOs through those accoutns, accumulating all the shares allotted to these fictitious accounts in key operators' account, transferring those shares to the petitioners for their benefit in their account, selling of these on the day of the listing of those securities or soon thereafter. In this entire game plant it is the petitioners who derived such benefit, which they were otherwise not entitled to.

This aspect is very succinctly brought by quoting the case of 'Suzlon Energy Limited', in paras 6.2 onwards. In para 6.5 it is mentioned that the 'retail segment' was 6.04 times oversubscribed, whereas the 'institutional segment' was 40.27 times oversubscribed. This shows that the petitioners could corner the shares in 'retail

segment' by subscribing 6.04 times only. They were otherwise required to subscribe in 'institutional segment'. In that event they would have been required to subscribe 40.27 times. This makes a big difference. The learned senior counsel for SEBI has already submitted that this is only an illustrative case. The entire order is based on material which is found during investigation undertaken by the SEBI. He has assured this Court that the SEBI is open to revise, review, modify and even in case of necessity to recall the order, if the person against whom the order is passed approaches the SEBI and satisfies it about one's bona fies.

During the course of arguments one of the learned senior counsels for the petitioners had submitted that in some other case the SEBI has revised its order, therefore, on the same line the SEBI be directed to reconsider the cases of petitioners also and that will serve the ends of justice.

In response to this, the learned senior counsel for the SEBI had submitted that the SEBI had revised the order after the person concerned had approached the SEBI and explained his conduct and his dealings. He had also submitted that the impugned order itself invites affected entities at large by para 17.18. Para 17.18 states that,

> “This order shall be treated as Show Cause Notice against the concerned entities named herein. The entities/ persons against whom this order is issued may file their objections, if any, to this order within 15 days from the date of this order and, if they so desire, avail themselves of an opportunity of personal hearing at the Securities and Exchange Board of India, ...”

Though it is emphatically submitted by the learned senior counsel for the petitioners but this Court has no material to come to the conclusion and to hold that the SEBI has drawn 'final conclusions' against the persons, whose names are mentioned in para 17 of the order including the petitioners.

Similarly, this Court has no material before it to conclude and hold that the SEBI will not take into consideration the explanation/ objections filed by the petitioners.

In the result, in view of the aforesaid discussion, this Court is of the opinion that SEBI having deemed

fit has passed the order, it has passed the order, being ***expert*** on the subject. It is for the ***expert*** to decide as to out of the available courses, which course is to be adopted. This Court will not only be slow but will not like to interfere in the discretion exercised by an expert on the subject. In the result these petitions fail and the same are summarily dismissed. Notice is discharged. No order as to costs.

At this juncture at the request of the learned senior counsel for the petitioners it is clarified that any opinion expressed by this Court in this judgement and order is 'prima facie opinion'. The order under challenge itself is based on 'prima facie conclusions' by SEBI. In the event the petitioners approach the SEBI, the SEBI is expected to decide the objections/ explanation in accordance with law without being influenced by any of the observations made in this judgement/ order.

62. At this stage, the learned senior counsel for the SEBI submitted that in Special Civil Application

No.9971 of 2006, the petitioners had obtained an order on 4th May 2006. The Court had issued 'notice' and granted 'ad interim relief in terms of para 13(b)'. Para 13(b) reads as under:

> “13(b) Pending admission and final hearing of this petition an ex parte ad interim injunction may be granted restraining the respondent himself or through its agent from implementing the impugned order dated 27.4.2006 and annexed at Annexure 'A' insofar as it applied to the petitioner.”

The learned senior counsel for respondent submitted that after obtaining the ad interim relief the petitioners in Special Civil Application No.9971 of 2006 have sold off all salable securities. He submitted that the SEBI immediately filed Civil Application No.7139 of 2006 praying for vacating of ad interim relief granted in favour of the opponent-original petitioner vide order dated 4th May 2006.

63. The learned senior counsel for the SEBI submitted that as the application was filed under Article 226(3), the order of ad interim relief stood

vacated, but then during the period for which the ad interim relief remained operative the petitioners have sold off all salable securities. He submitted that the consequential orders be passed for 'restitution of the gain received by the petitioners by virtue of order granting ad interim relief.

64. As this judgement and order is common in a group of petitions, no order is passed on this prayer. It will be open for the SEBI to file a separate application placing all relevant material on record so that appropriate orders can be passed in this behalf, after according an opportunity to the petitioners.

The notices issued vide order dated 20th June 2006 in Special Civil Application No.9971 of 2006, to the Indian Express, Mumbai and The Financial Express, Mumbai, are discharged.

The learned advocate for the applicant seeks permission to amend the date of order in Civil Application No.7139 of 2006, which is mentioned to be 3rd May 2006 in place of 4th May 2006. The permission

is granted.

As the main matter is disposed of, Civil Application No.7139 of 2006 in Special Civil Application No.9971 of 2006 is also disposed of.

(RAVI R. TRIPATHI, J.)

karim